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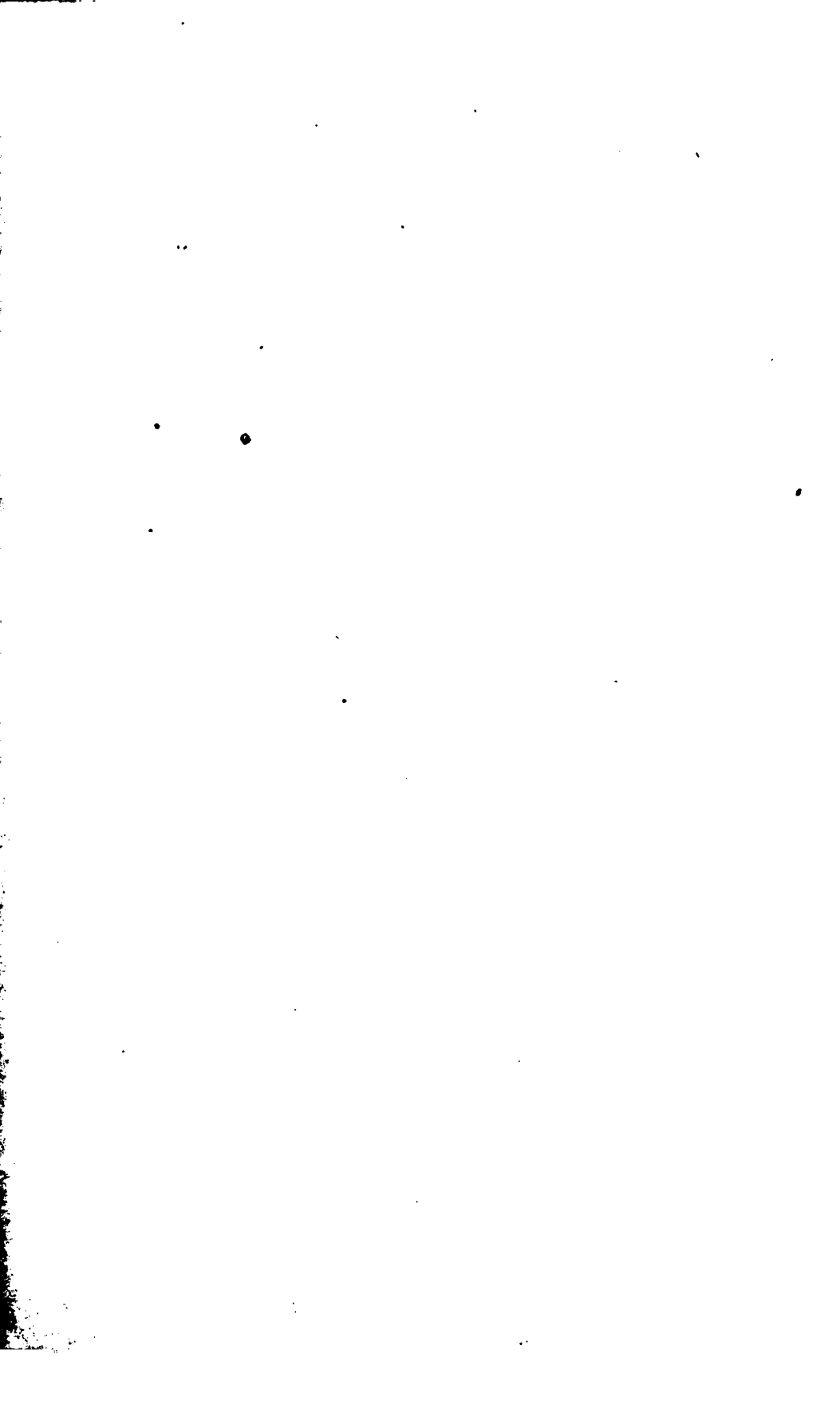
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THE LAW
OF
MARINE INSURANCE,
&c.

VOL. II.



A
T R E A T I S E
ON THE
LAW OF MARINE INSURANCE

AND
AVERAGE:

WITH
REFERENCES TO THE AMERICAN CASES, AND THE
LATER CONTINENTAL AUTHORITIES.

BY
JOSEPH ARNOULD, ESQ.

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW,
AND LATE FELLOW OF WADHAM COLLEGE, OXFORD.

SECOND EDITION,
WITH ANNOTATIONS
BY
J. C. PERKINS, ESQ.

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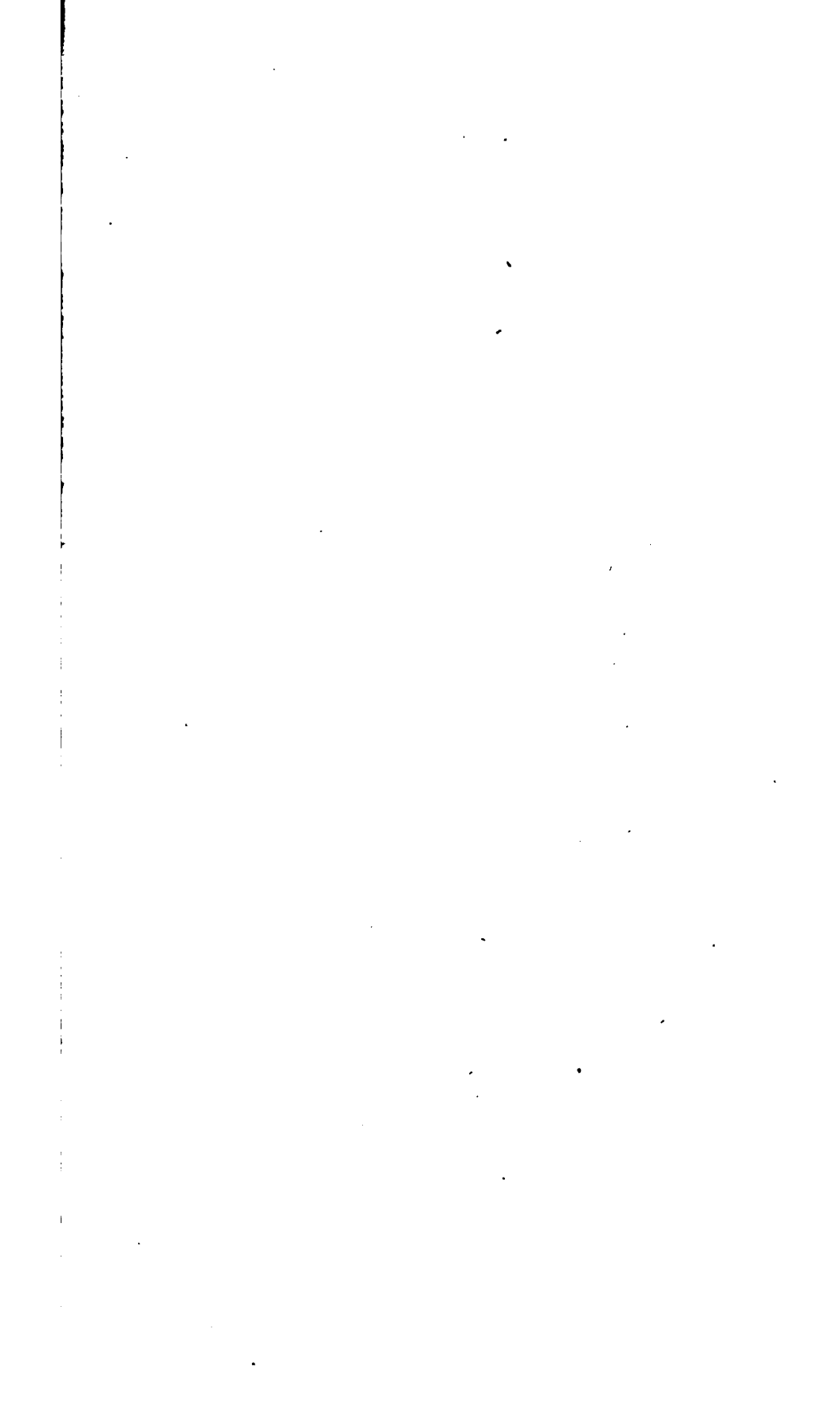
ON

MARINE INSURANCE.

PART III.

**OF LOSSES, AND THE RELATIONS OF THE ASSURED AND
UNDERWRITERS THENCE ARISING.**

**OF the different Kinds of Losses for which the Under-
writer is liable, and the Rights and Duties of the Parties to
the Contract in case of Loss.**



*CHAP. I.

* 753

RISKS COVERED BY THE POLICY. — LIMITATIONS OF UNDERWRITER'S LIABILITY.

BEFORE proceeding to consider that clause in the policy which enumerates the specific perils against which the underwriters engage to indemnify the assured, we will direct our attention to certain general principles which, in all cases alike, limit and modify the underwriter's responsibility ; or, in other words, which ascertain what risks he assumes by the common form of policy.

The following, therefore, will be the division of the chapter :—

- Sect. I. Risk of loss not falling within the term or voyage insured.
- Sect. II. Risk of loss by wear and tear of ship, or by the inherent vice of perishable commodities.
- Sect. III. Risk of loss not proximately caused by the perils insured against: *Causa proxima non remota spectatur*.
- Sect. IV. Risk of loss occasioned by the acts or negligence of the assured or his agents.
- Sect. V. Limitation of *owner's* responsibility for acts or negligence of the master and mariners.
- Sect. VI. Risk of loss occasioned by the acts of the government of the assured.
- Sect. VII. Risk of loss by interdiction of commerce, or blockade or embargo of the port of destination.
- Sect. VIII. Risks of foreign smuggling trade.
- Sect. IX. Risk of loss by subsequent events.
- Sect. X. Liability of underwriter on one subject of insurance for loss on or on account of another.

754 * *SECT. I. *Risk of Loss not falling within the Term or Voyage insured.*

Risk of loss not falling within the term or voyage insured.

The underwriter is liable for no loss unless it takes place within the limits of the risk.

Of the liability of underwriters on a time policy for loss caused before, but not eventuating in a total loss till after the expiration of the term. Case of *Merestony v. Dunlop*, 1 T. Rep. 260.

Remarks on this case.

§ 280. It is one of the most fundamental principles of insurance law that, in order to make the underwriter liable for any loss, it must be shown to have taken place within limits of the risk as ascertained by the policy. This elementary principle has already been so fully illustrated, especially in treating of the duration of the risk (a), that nothing more can be requisite here than briefly to notice one or two of the less obvious or more doubtful applications.

A doubt has been raised as to the liability of underwriters on a *time policy* for a loss caused by one of the perils insured against during the continuance of the time, but not eventuating in a total loss till after the expiration of the time. The facts of the case in question, which is not reported in length, but only cited by the court in giving judgment on another occasion, are these: A ship, insured for six months, met with a fatal injury (in technical language, received *death's wound*) at sea three days before the expiration of six months, but was kept afloat by pumping till three days after, it was held that the underwriters were not liable. (b)

It is not so declared in terms, but it seems quite clear from the above statement, and also from the whole tenor of the judgment in the course of which the case was cited, that the action was brought for a *total loss* in respect of the ship having *foundered at sea* at the end of the three days; and on this view the case is only an authority for the position that an underwriter, under such circumstances, would not be liable *as for a total loss*: it does not show that he would be liable *as for an average loss* to the extent of the damage done to the ship by the casualty up to the expiration of time as far as this could be ascertained.³ But even with

(a) Part I. Chap. XV.

(b) *Merestony v. Dunlop*, cited 1 T. Rep. 260.

¹ See *ante*, 411, and cases to this point, in note, 451, et seq.

² *Coit v. Smith*, 3 John. Cas. 16.

limitation the doctrine of the case seems doubtful. It is *opposed, apparently on very solid grounds, by Mr. Ben-
ecké (c), and has been pointedly rejected in the United
States (d): it also seems, on the whole, inconsistent with the
principle of decision acted upon by Kord Kenyon and the
Court of King's Bench in the subsequent case of *Shawe v.*
Felton, in which it was held that if a ship, insured in a *voyage*
policy, arrives at her port of destination so fatally damaged,
in consequence of a death's wound received during the voy-
age, that she can only be kept afloat by artificial means, her
subsequent total loss, by foundering in the port, is at the risk
of the underwriter, though it may not take place *until more*
than twenty-four hours after her arrival. (e)

Risk of loss not
falling within
the term or voy-
age insured.

* 755

Shawe v. Felton
seems opposed
to the doctrine
of *Meretony v.*
Dunlop.

As a further illustration of this principle, it may be added
that where the insurance is on perishable commodities war-
ranted free of average (by the common memorandum) under
a certain per centage, and the defence set up is, that the ship
has *deviated* in the course of the voyage, the assured, in order
to recover, must show that the damage done to the goods ex-
ceeded the required per centage *before the ship turned off her*
course. (f)

In cases of de-
viation, the loss
must be shown
to have taken
place before the
ship turned off
her course.

SECT. II. *Risk of Loss by Wear and Tear of Ship, or by the inherent Vice of Perishable Commodities.*

§ 281. Another important limitation on the underwriter's
liability is, that he undertakes to indemnify the assured only
against loss caused by the direct and violent operation of the
perils insured against, and not against the ordinary wear and
tear of the voyage.

Risk of loss by
wear and tear
of ship, or by
the inherent
vice of perish-
able commodi-
ties.

*No ship can navigate the ocean for any length of time,
even under the most favorable circumstances, without suf-
fering a certain degree of decay and diminution in value,

The underwri-
ter is not liable
for the ordinary
wear and tear
of the voyage.

* 756

(c) See Ben-
ecké, *System des Assesu-
rants*, chap. viii. sect. 3, vol. ii. pp. 448-
450, ed. 1807.

(d) See 3 Kent's Comm. (5th ed.) 308,
note (a), and see the case of *† Peters v.*
Phoenix Ins. Comp. 3 Serg. & Rawle, 25.
See also *† Coit v. Smith*, 3 Johns. Cases,
16. 1 Phillips on Ins. 709.

(e) *Shawe v. Felton*, 2 East, 109. This
indeed, is not a direct authority against
Meretony v. Dunlop, because it proceeded
mainly upon the construction of the clause
"until moored for twenty-four hours in
good safety."

(f) *Hare v. Travis*, 7 B. & Cr. 14.

Risk of loss by wear and tear of ship, or by the inherent vice of perishable commodities.

which is generally comprised under the term *wear and tear*; for, this, however considerable, if it arises merely from ordinary operation of the usual casualties of the voyage, the underwriter is never liable: he is only liable when the damage sustained is in itself of an *extraordinary nature*, and has been caused by the *direct and violent operation* of one of the perils insured against.¹

To discriminate wear and tear from average loss is frequently difficult.

Such is the undoubted rule; but its application is often a matter of great nicety; in fact, few things in the law of marine insurance have been found more difficult in practice than to discriminate between damage occasioned by *ordinary service of the voyage*, and that caused by the perils of the sea.

Illustrations of the distinction between wear and tear and average losses.

We shall have occasion to advert to the subject more at length when we come to treat, in the next section, of the distinction between the perils of the sea; meanwhile the following may be taken as some of the more striking practical illustrations of the distinction in question.

What is average loss, and what wear and tear in case of cables and anchors.

If a cable be chafed by the rocks, or the fluke of an anchor broken off, in a place of usual anchorage, and under no extraordinary circumstances of wind and weather, this is ordinary wear and tear of the voyage which falls on the owner alone, and for which the underwriter is not liable; if, on the other hand, the same thing were to occur in a place of unusual anchorage, or even in the usual anchorage ground in a gale of extraordinary violence, the underwriter would be liable for the loss as caused by the perils of the sea. (g)

In case of masts, spars, and sails.

Where a mast is sprung, or spars snap, by the direct

(g) *Benecké Pr. of Indem.* 456. *Stevens on Average*, 160, 8th ed. 1 *Phillips on Ins.* 646.

¹ *Barnewall v. Church*, 1 *Caines*, 234; *Coles v. Marine Ins. Co.* 3 *Wash.* 159; *Potter v. Suffolk Ins. Co.* 2 *Sumner*, 197; 3 *Kent*, (5th ed.) 300; *Flemming v. Marine Ins. Co.* 4 *Whart.* 59. The insured must prove that the necessity for repairs made by him during the course of the voyage arose from some extraordinary cause. The *onus probandi* is on the insured to establish this by competent and satisfactory proofs. It is not sufficient to show seaworthiness at the commencement of the voyage and rest upon that; because there is no rule, or presumption of law, which makes the seaworthiness of a vessel at the commencement of the voyage *pro facie* evidence that the subsequent repairs, necessary to be made during the voyage, arose from an extraordinary peril. Otherwise the underwriters might be made liable for losses from mere wear and tear. *Donnell v. Columbian Ins. Co.* 2 *Sumner*, 3

action of the wind, the fact itself proves the violence to have been extraordinary, and the loss falls on the underwriter as caused by a peril of the sea (*h*): the result is the same if the *ship in a heavy cross rolling sea pitch or lurch away her masts. (*i*)

Risk of loss by wear and tear of ship, or by the inherent vice of perishable commodities.

* 757

So, if sails are blown from the bolt ropes, or split by a squall coming on so suddenly that they could not be furled, this is a loss by the perils of the sea, and not by the ordinary wear and tear of the voyage (*j*), and the decision of our English courts has been to the same effect when sails are split, or masts are carried away, in consequence of crowding a press of sail to avoid an enemy or a lee shore. (*k*)

On the other hand, if masts or spars are damaged, or sails torn, worn out, or carried away, in the ordinary service of the ship, and not by the direct and violent operation of any extraordinary casualty; in other words, by any of the perils of the seas, in the sense which these words bear in policies of insurance, this is undoubtedly only wear and tear, and does not fall upon the underwriter. (*l*)

The damage caused by springing a-leak is not a charge upon the underwriters, unless it can be directly traceable to the immediate and violent operation of some peril insured against; as where the leak can be proved to have been caused by a heavy sea striking the vessel, or by her being driven on a rock, &c.: where the leak arises from the unseaworthy state of the ship when she sailed, and is only a consequence of that ordinary amount of straining to which she would unavoidably be exposed in the general and average course of the voyage insured, the underwriter is not liable. (*m*)

Damage caused by springing a leak, when wear and tear, and when average.

Damage done to the hull of the ship in the course of defending her against an enemy, is not ordinary wear and tear of the voyage, at all events as regards a *merchantman*, but is a loss for which the underwriter is liable. (*n*)

Damage done to the hull of the ship, as by enemy's shot, by worms, rats, &c.

(*h*) See 1 Phillips on Ins. 644.

(*i*) Stevens on Average, 166, 5th ed.

(*j*) Benecké Pr. of Indem. 454.

(*k*) Covington v. Roberts, 2 Bos. & Pull. N. R. 378. Stevens on Average, 168, 5th ed. Even here, M. Benecké thinks that, except under extraordinary circumstances, this loss would not fall on the underwriters, "because the dangers in which these losses originate are occurrences which

frequently take place, and which the vessel ought to be able to resist." P. 455, *sed quære*.

(*l*) Benecké, Pr of Indem. 451. 1 Phillips on Ins. 645, 646.

(*m*) Stevens on Average, 170, 5th ed. and see the cases collected in the chapter on Unseaworthiness, *ante*, Part II. Chap. IV.

(*n*) Taylor v. Curtis, 6 Taunt. 608. 2

Risk of loss by wear and tear of ship, or by the inherent vice of perishable commodities.

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Damage to copper sheathing.

*Damage done by storm to the ship's upper works falls on the underwriter when amounting to above three per cent.

Damage done to the hull of the ship by worms¹ and is, generally speaking, regarded as falling within the ordinary wear and tear of the voyage, and not as a loss falling on the underwriters. (*p*)

With regard to *copper sheathing*, the right rule would be, that the underwriter ought to be responsible for damage violently done to it by the direct operation or perils of the sea, as where it is torn or scraped off by ice in consequence of a storm; on the other hand he ought to be liable for any deterioration, which, considering the age of the sheathing, and the incidents of the voyage, fairly be attributed to wear and tear. (*q*)

Such are some of the points that have been established on this subject, either by the courts of law, or by the general practice of mercantile men; in every case, as is obvious, much must be left to the practical judgment of the arbitrators, and the only principle that can be laid down is already mentioned, viz., that whenever the loss can, upon a fair review of all the circumstances, be imputed to the ordinary wear and tear of the voyage, the underwriter is exempt from liability.

Underwriter is not liable for loss arising from the *proper vice* of the thing insured.

§ 282. Upon the same ground, the underwriter is not liable for that loss or deterioration which arises solely from a principle of decay or corruption inherent in the subject insured, or, as the phrase is, from its *proper vice*; thus, if fruit comes rotten, or flour heats, or wine turns sour, not

Marshall's Rep. 309. Stevens on Average, 167, 168, 5th ed. *contrd.* But See Benecke, Pr. of Indem. 456.

(*o*) Stevens on Average, 161, 5th ed. Benecke, Pr. of Indem. 454. 1 Phillips on Ins. 643.

(*p*) As to worms, see Rohl v. Esp. 244. 1 Phillips on Ins. 639. 3 Comm. (5th ed.) 300, note (*a*). As to Hunter v. Potts, 4 Camp. 203. Comm. *ibid*.

(*q*) 1 Phillips, Ins. 643.

¹ See Hazard v. N. Eng. Marine Ins. Co. 1 Sumner, 218, 228; S. C. 81 (S. C.) 557; Martin v. Salem Ins. Co. 2 Mass. 429; *post*, 803. But see Perinton, J. in Depeyster v. Col. Ins. Co. 2 Caines, R. 35.

² See Abbott, Shipp. (6th Am. ed.) 388, in note; Aymar v. Astor, 6 Cowen But Garrigues v. Coxe, 1 Binney, 592, is contrary. 3 Kent, (5th ed.) 300, 3 note; Story, Bailm. § 513; *post*, 803.

external damage, but entirely from *internal* decomposition, the underwriter is not liable for the loss thence arising. (r)

*Thus, if spontaneous combustion is generated by the effervescence or other chemical change of the thing insured, arising from its having been put on board *wet*, or otherwise damaged, the underwriter is not liable (s); but it lies upon him to show clearly that the fire really arose from this cause. (t)

Upon the same principle, the underwriter is never liable for that *ordinary and inevitable* amount of leakage and breakage to which wines, spirits, molasses, oil, earthenware, glass, and other liquid or brittle commodities are necessarily exposed in the usual course of even the most fortunate voyage.¹

This is a rule universally established by the general law maritime of all nations, where the practice of marine insurance is known. (u) Mr. Stevens states that, by the custom of Lloyd's, articles liable to leakage and breakage, though not enumerated in the common memorandum, are always understood to be "free of average" (i. e. the underwriter, as to them, is liable for no *partial* loss, however great its amount may be,) unless it can be shown that the ship in the course of the voyage has struck the ground with such force as thereby to have damaged her stowage. (v) Lord Denman, however, in a recent case, considering this to be an unreasonable usage, would not allow it to be given in evidence to defeat the claim of the assured; the facts of the case were shortly these: thirty-six casks of oil insured from London to St. Petersburg, were safely stowed at the beginning of the voyage, but in the course of it, in consequence of the *pitching and laboring of the ship in cross seas*, they leaked to such an extent that ten of the casks were completely emptied, and

Risk of loss by wear and tear of ship, or by the inherent vice of perishable commodities.

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Loss by spontaneous combustion is not covered by the policy.

Loss by ordinary leakage and breakage not covered by the policy.

But for extraordinary leaking caused by the violent pitching and laboring of the ship at sea, the underwriter is liable, though the stowage may not have been disturbed. *Crofts v. Marshall*, 7 C. & P. 597.

(r) See all the authorities collected by Emerigon, chap. xii. sect. ix. Du Vice propre de la Chose, vol. i. pp. 368-392. ed. 1827.

(s) Emerigon, chap. xii. sect. xviii. § 4, vol. i. p. 430. ed. 1827.

(t) *Boyd v. Dubois*, 3 Camp. 132.

(u) For the general principle, see Emerigon, chap. xii. sect. ix. vol. i. p. 369, who, as usual, collects all the authorities. See also Code de Commerce, art. 355. Stevens on Average, 219. 5th ed. Vaucher's Guide to Marine Insurance, *passim*.

(v) Stevens on Average, 219. 5th ed.

¹ See 3 Kent, (5th ed.) 300. The mere fact shown by the assured, that goods insured were found, after their arrival, damaged by sea water, is not evidence of a loss by the perils of the sea. *Flemming v. Marine Ins. Co.* 3 Watts & Serg. 144.

Risk of loss by wear and tear of ship, or by the inherent vice of perishable commodities.

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In this country the *ordinary* amount of leakage and breakage for which underwriters are not to be responsible is not fixed by law.

In the United States, and generally on the Continent, a certain per centage of leakage and breakage is fixed, for which the underwriter is not liable.

Stipulations in the French policies on this subject.

the rest had lost a great part of their contents; the however, had not shifted their places, in other words, *storage was not damaged*;" the defendants proposed to give in evidence the custom of Lloyd's, as set forth by Stevens in the above passage. Lord Denman rejected the evidence, and told the jury to consider whether the loss in fact caused by what they considered *perils of the seas* the jury being unable to agree, a verdict was taken by ac for the defendant. (w)

In our own country no fixed rule is laid down as to what shall be considered *ordinary* leakage and breakage on articles on a given voyage.

In the United States, and generally on the continent of Europe, a certain per centage is fixed, varying upon different articles, and upon voyages of different length and duration; as the ordinary amount of leakage and breakage, for which the underwriter can in no case be liable, even though the ship may be wrecked or stranded; for any amount of leakage and breakage beyond this average amount he will be liable, if the ship be wrecked or stranded, but not otherwise.

In the United States, this amount is in some cases fixed by the rules of the different insurance companies. (x)

In the different forms of policy in use in the different ports and cities of France, stipulations to this effect are generally introduced, liable, of course to be varied at the option of the parties.

Thus, to take one instance out of many, in the form of policy commonly in use in Bordeaux, it is stipulated —

"That the insurers shall be altogether free from particular averages, should there not be stranding, on *leakage of light* and *should there be stranding*, they shall only pay the *average* leakage, fixing henceforward the *usual* leakage 5 per cent. on distant or coasting voyages, at 10 per cent. on long voyages, as far as Cape Horn or the Cape of Good Hope, and at 15 per cent. on all voyages beyond the Capes." (y)

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*Similar provisions, varying as to the amount of per centage fixed on, are to be found in all French policies. (z)

(w) Crofts v. Marshall, 7 C. & P. 597. tried at Guildhall before a special jury.

(x) 1 Phillips on Ins. 628, 629.

(y) See form of *Bordeaux* policy, in the French's Guide to Marine Insurance.

(z) See form of *Havre* policy, &c.

§ 283. Upon the same principle in insurances upon living animals, the underwriters are not liable for losses solely arising from their *disease or natural death*; such losses being considered as proximately caused not by the perils insured against, but by the natural and inherent tendency to decay; in other words, from the *proper vice* of the subject insured.

Risk of loss by wear and tear of ship, or by the inherent vice of perishable commodities.

Where the loss of live stock arises solely from natural mortality, as for instance where cattle die at sea from any infectious disorder, which might equally have affected them on land, or of some disease which, though probably in part occasioned by the confinement and other usual circumstances of the voyage, is yet not *proximately caused* by any extraordinary, violent, or immediate agency of the perils insured against, the underwriters are undoubtedly not liable for the loss.

In insurances on living animals, the underwriters are not liable for losses solely arising from their disease or natural death.

Like all other investigations, however, in which the endeavor is to distinguish between the more remote occasion and the immediate cause of loss, the question of the underwriter's liability for losses of this description, has given rise to much fanciful reasoning and many very refined and subtle distinctions, more worthy of schools of logic than courts of justice.

As long as negro slaves were universally regarded by the jurists of civilized and Christian Europe as mere live stock, it was gravely determined that the self-inflicted death, produced by the horror and despair of a fellow man, was a loss arising from the proper vice and inherent pravity of the *thing* insured, and as such was not to be at the charge of the underwriters. (a)

Cases on the mortality of negro slaves. Death of negro slaves caused by *suicide* was held not to be at the risk of the underwriter.

*The courts were even driven to the disgrace of listening to solemn arguments to prove the position (which they only evaded establishing as law by resorting to a technical point of pleading) that the loss occasioned by throwing overboard part of the human cargo of an overloaded slaver, in order to

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Loss caused by throwing overboard negro slaves, in consequence of a scarcity of water. *Gregson v. Gilbert*.

77. *Nantes* policy, *ibid.* 118, 119, *Paris*, *Traité d'Assurance*, No. 66, and see M. (Compagnie Generale,) *ibid.* 137, &c. &c. See also the *Amsterdam* policy, *ibid.* 11, 13. *Answer*, art. 9, 10. *ibid.* 19.

(a) *Valin*, *Comment. sur l'Ordonnance de la Marine*, tit. vi. art. 11, 15. *Pothier*

Traité d'Assurance, No. 66, and see M. Estrangin, *ibid.* Emerigon, to his great honor, shows a proper degree of repugnance to these disgraceful doctrines, chap. xii. sect. x. *Mort et Revolte des Negres*, vol. i. p. 392 ed. 1827.

Risk of loss by wear and tear of ship, or by the inherent vice of perishable commodities.

Case of Jones v. Schmoll, 1 T. Rep. 130.

avoid a scarcity of water, was a loss for which the underwriters were not liable as an ordinary peril of the sea. (b)

Nay, Lord Mansfield himself had to undergo the melancholy degradation of applying all the subtlety of his intellect in order to assist a special jury of London merchants in coming to the following conclusions in a case where "fatality by mutiny of slaves" was included amongst the insured against.

1. That all the slaves who were killed in the mutiny died of their wounds, were to be paid for.

2. That all those who died of their bruises, which they received in the mutiny, though accompanied by other causes were to be paid for.

3. That all who had *swallowed salt water*, or *leaped the sea*, and hung upon the sides of the ship without otherwise bruised, or *died of chagrin*, were not to be paid for. (c)

Death of slaves from scarcity of food and water on the passage. Tatham v. Hodgson.

In the last case upon this subject in our books, it was decided that where negro slaves died on the passage from scarcity of food caused by the *extraordinary and unavoidable* delay of the voyage, this was a case of natural death, for which the underwriters were not liable. (d)

Happily, since the extinction of the African slave trade in this country, and the numerous international treaties between our own and foreign governments for the suppression of the traffic, English underwriters can no longer have any immediate concern with insurances upon slaves.

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*Several of the principles, however, established by the above decisions are still applicable to insurances on live stock.

Cases of insurance on live stock.

If live stock die of scarcity of provisions, caused by the extraordinary and unavoidable delay of the voyage, this is not at the risk of the underwriters.

Thus, in a case where thirty mules, ten asses, and ten oxen were insured "at and from Cork to Barbadoes and St. Vincent, warranted *free of mortality* and jettison," Tenterden held, upon the authority of the case of Tatham v. Hodgson, just cited, that if the ship had been driven off her course by the perils of the sea, and the voyage thereby had become so protracted as to exhaust all the means of sustaining the live stock, and consequently the means of sustaining the live

(b) *Gregson v. Gilbert*, Park, 103, 7th ed. 130. The above is taken verbatim from Marshall on Ins. 560.

(c) *Jones v. Schmoll*, cited 1 T. Rep.

(d) *Tatham v. Hodgson*, Park 141, 8th ed.

the animals insured, then the words, "*warranted free from mortality*," introduced into the policy, would have protected the underwriters from liability for loss arising from such cause. (e)

Risk of loss by wear and tear of ship, or by the inherent vice of perishable commodities.

Where the perils of the sea have been a conducting cause of the loss of live stock thus insured, it is often a matter of great difficulty and nice discrimination to settle the question of the underwriter's liability.

In the case just cited, where, as we have seen, the underwriters expressly stipulated not to be liable for any average loss caused by "*mortality*," it appeared that all the animals, insured, except five mules and one ass, died on the voyage of severe bruises, lacerations, and injuries, *arising from the violent pitching and rolling of the ship, occasioned by a furious storm and the consequent agitation of the sea*, Lord Tenterden and the rest of the judges of the King's Bench decided, though not without some doubt, that this was a loss by the perils of the sea, for which the underwriters were liable, and against which they were not protected by the warranty to be "*free of mortality*;" for the word *mortality*, in its ordinary sense, never means *violent death*, but *death arising from natural causes*. (f)

Death of animals from bruises caused by the violent pitching of the ship in a storm, held a loss for which the underwriters were liable, though the policy contained a warranty to be "*free of mortality*."

Lawrence v. Aberdeen, 5 B. & Ald. 107.

And in a subsequent case of the same kind, where horses were insured from Liverpool to Jamaica, with the same warranty to be "*free of mortality and jettison*," and it appeared *that the horses which had been in the first instance properly secured between decks, in the course of the voyage, and without any fault of the assured, by the laboring of the vessel in a violent storm, first broke the slings by which they were supported, and then having kicked down the partitions by which they were separated, and being unable to stand, owing to the great rolling of the vessel, kicked and bruised each other so violently that, by that means, combined with the injuries received from the pitching of the vessel, they all died in the course of the storm; the court felt bound by their former decision to hold, that the underwriters were liable for this loss, as a loss by the perils of the sea. (g)

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Where horses, insured under a similar policy, owing to the violent laboring of the ship, broke from their slings, and were killed, partly by kicking, partly by injuries received from the rolling of the vessel: held, that the underwriters were liable.

Gabay v. Lloyd, 3 B. & Cr. 793.

(e) Per Lord Tenterden in Lawrence v. Aberdeen, 5 B. & Ald. 111.

(f) Lawrence v. Aberdeen, 5 B. & Ald. 107.

(g) Gabay v. Lloyd, 3 B. & Cr. 793. All the court held that this case fell within that of Lawrence v. Aberdeen, with which decision Abbott, C. J. (Lord Tenterden,) decided.

SECT. III. *Risk of Loss not proximately caused by the 1
insured against : Causa proxima non remota spectatur*

Risk of loss not
proximately
caused by the
perils insured
against: *Causa
proxima non re-
mota spectatur.*

The underwriter is liable for no loss which is not proximately caused by the perils insured against; but he is liable for all loss that is so caused.

Hence the maxim *causa proxima non remota spectatur* has a two-fold application in practice.

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§ 284. To prevent uncertainty and dispute, it is a rule that the underwriter is liable for no loss which is proximately caused by the perils insured against. *Causa proxima non remota spectatur* is a fundamental principle of the law of insurance, and the reason is, as given by Bacon, that "it were infinite for the law to consider causes of causes, and their impulsions one on another, therefore it contenteth itself with the *immediate* cause." (h) ¹

This maxim as applied in practice has a twofold operation—partly to limit, and partly to enlarge the underwriter's responsibility. It acts in the latter mode in all those cases where it has been decided that the underwriter shall be liable for all losses that are *proximately caused* by the perils insured against, though they may be remotely occasioned by the negligence of the assured or his agents. (i) ² It operates in the same way in those cases, where the question is, whether the cause of loss has been correctly *alleged in the declaration*

Bayley, J. and Holroyd, J. expressed themselves perfectly satisfied; but Mr. J. Littledale said he doubted whether he should have concurred with it.

(h) *Maxims of the Law*, 35. *Law Tracts*, 1737, cited by Lord Denman in *De Vaux v. Salvador*, 4 Ad. & Ell. 431.

(i) *Rusk v. Royal Exch. Ass.* 2 Ald. 72. and the line of cases between that and *Redman v. Wilson*, 14 M. Wels. 476, which are cited in the section. { *Post*, 806, 807. }

¹ In *Peters v. Warren Ins. Co.* 3 Sumner, 369, it was decided, that the *Causa proxima non remota spectatur*, is not of universal application in the law does not exclude incidental losses, flowing as a legal or natural consequence from direct injury or loss to the thing insured. See *Peters v. Warren Ins. Co.* 14 (S. C.) 99; *Magoun v. N. Eng. Marine Ins. Co.* 1 Story, C. C. 157. All expenses resulting as a direct and immediate consequence of a peril insured against, are covered by the policy. *Hale v. Washington Ins. Co.* 2 Story, C. C. 176.

² See *Georgia Ins. and Trust Co. v. Dawson*, 2 Gill, 365; *Delano v. Bedford Ins. Co.* 10 Mass. 347, 354; *Williams v. Suffolk Ins. Co.* 3 Sumner, 276, 277; 3 (5th ed.) 300, note, 306, 307; *Pataasco Ins. Co. v. Coulter*, 3 Peters, (S. C. Colum. Ins. Co. v. Lawrence, ib. 517; *Walters v. M. L. Ins. Co.* 11 ib. 213; 1 M'Lean, 275; *Georgia Ins. and Trust Co. v. Dawson*, 2 Gill, 365; *Perrin v. P. tion Ins. Co.* 11 Ohio, 147; *American Ins. Co. v. Insley*, 7 Barr, 223; *Potter v. folk Ins. Co.* 2 Sumner, 197, 200; *Copeland v. N. Eng. Marine Ins. Co.* 2 M. 432, 450; *Ellery v. N. Eng. Ins. Co.* 8 Pick. 14.

and the rule then is, that although other perils may have been contributory to the loss, yet the assured shall recover in the action, if the *proximate* or substantive cause of loss was that alleged in the declaration. (*j*)

Risk of loss not proximately caused by the perils insured against: *Causa proxima non remota spectatur.*

Illustrations of the first branch of the rule; viz. that the underwriter is liable for no loss that is not proximately caused by the perils insured against.

We shall have occasion elsewhere to discuss the two classes of cases just referred to; our object here is merely to consider, very briefly, the application of the rule, in as far as it tends to limit the underwriter's responsibility.¹

Thus, loss arising from sale of goods, to defray expenses of repairing a ship in a port of distress, has been held, on this ground, not to be within the policy, at all events as against the underwriter *on goods*. (*k*)

So, loss of voyage, caused by interdiction of commerce, blockade, or hostile possession of the port of destination, is not a risk within the policy, being the effect of a peril acting not *immediately*, but *circuitously*, on the thing insured. (*l*)²

So, the expense of wages and provisions of the crew during a delay for repairs, or detention by an embargo, is not a risk within the policy; though this, indeed, rather depends on the principle, that all such expenses are a charge, not on

(*j*) *Green v. Elmalie*, Peake's N. P. 212. *Heyman v. Parish*, 2 Camp. 149. *Arcangelo v. Thompson*, *ibid.* 620. *Livie v. J'Ansen*, 12 East, 648. *Hahn v. Corbett*, 2 Bingh. 265, and other cases cited *post*, Part IV. Chapter "On the Declaration."
(*k*) *Powell v. Gudgeon*, 5 Maule & Sel. 431. *Sarquy v. Hobson*, 4 Bingh. 131.
(*l*) *Hadkinson v. Robinson*, 3 Bos. & Pull. 388. *Lubbock v. Rowcroft*, *Esp. 67*, &c. and see *post*, Sect. VII.

¹ If the ship is so disabled by a storm, that she becomes unmanageable, and thereby her boat is lost, and the loss is properly attributable to the crippled and disabled condition of the ship by the storm, the loss is properly attributable to the storm, although the cause of it did not occur during the actual continuance of the storm. The rule, *causa proxima non remota spectatur*, does not apply to such a case. *Potter v. Ocean Ins. Co.* 3 Sumner, 27. In this case, Mr. Justice Story said, — "In causes of this sort it will not do to refine too much upon metaphysical subtleties. If a vessel is insured against fire only, and is burnt to the water's edge, and then fills with water and sinks, it would be difficult in common sense, to attribute the loss to any other proximate cause than the fire, and yet the water was the principle cause of the submersion. If a vessel be insured against barratry of the master and crew, and they fraudulently bore holes in the bottom, and thereby she sinks, in one sense she sinks from the flowing in of the water; but in a just sense, the proximate cause is the barratrous boring of the holes in her bottom." p. 42. See also *Peters v. Warren Ins. Co.* 3 Sumner, 399; *S. C.* 14 *Peters*, (*S. C.*) 991; *Hazard v. New Eng. Ins. Co.* 1 Sumner, 218, 229; for further illustration of this subject.

² See *Delano v. Bedford Ins. Co.* 10 Mass. 347; *Andrews v. Essex F. & M. Ins. Co.* 3 Mason, 21.

Risk of loss not proximately caused by the perils insured against: *Causa proxima non remota spectatur.*

Difficulty of applying the rule in practice, shown by two cases, in which Lord Denman and Mr. J. Story have applied it differently to almost the same state of facts.

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A sum ordered to be paid by the owner of one ship to another, under a foreign arbitration award, as compensation for damages caused by collision, is not recoverable under a count for loss by the perils of the sea. *De Vaux v. Salvador*, 4 Ad. & Ell. 420.

But in the United States such sum, ordered to be paid by sentence of a foreign court, has been held recoverable as a loss by the perils of the sea. [†] *Peters v. Warren Ins. Comp.* 3 Suma. Rep. 389.

the underwriter, but on the owner, as forming part of ordinary expenses of the voyage. (m) ¹

Without, however, adverting to further illustrations well established rule, which we shall have abundant occasion to consider elsewhere, we shall show the difficulty *of it: a tactical illustration, by citing the two following recent cases, wherein, upon two states of fact almost identical, Lord Denman and Mr. J. Story came to diametrically opposite conclusions.

The facts of the English case were shortly these: in the Hooghly river came into collision with a steamer considerable damage was done to each. The owner of the *ship* claimed compensation of the owners of the *steamer* and the claim having been referred to arbitration, awarded that each vessel should bear half the joint expense of the two. Under this award the ship had to pay a bill to the steamer; and the owner of the ship brought an action against his underwriter, to recover the sum he had been obliged to pay, as a particular average loss, laying the damage to have been caused "by the perils of the sea." The Court of King's Bench held that he could not recover, on this ground, as stated by Lord Denman, that the obligation to pay the sum in question was neither "a necessary proximate effect of the perils of the sea, but growing out of an arbitrary provision of the law of nations." (n)

In the American case the facts were these: — An American ship in the river Elbe, without fault on either side, came into collision with a Hamburg galliot, and sustained considerable injury. The owner of the *galliot* brought the case before the Marine Court of Hamburg, which, in pursuance of the regulations of the Hamburg ordinance, apportioned one-half the whole loss on the owners of each vessel. The owners of the *ship* having

(m) *Fletcher v. Poole*, Park on Ins. *spectatur*. *De Vaux v. Salvador* 115. 8th ed. *Eden v. Poole*, *ibid.* 117. & Ell. 428. *Robertson v. Ewer*, 1 T. Rep. 127. Lord Denman, however, puts these cases on the ground of *causa proxima non remota*. (n) *De Vaux v. Salvador*, 4 Ad. & Ell. 420.

¹ See post, 909, 911, and notes.

compelled to pay this sum, brought an action to recover it against their underwriters, laying the loss by *perils of the sea*. Mr. J. Story, giving the judgment of the Circuit Court, in the case, held the underwriters liable on the ground, that the damages so apportioned on the ship must be regarded as a *direct and proximate effect of the collision*. (o)

Risk of loss not proximately caused by the perils insured against: *Causa proxima non remota spectatur*.

* The learned judge, in the course of his elaborate judgment, reviews all the foreign and English authorities, and, amongst the rest, the case of *De Vaux v. Salvador*, from which he expressly dissents, fully admitting the general force of the maxim of *causa proxima non remota spectatur*, but disputing the correctness of its application in the particular instance.

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The following proposition is laid down by the great American jurist, as the result of all the authorities, and the foundation of his own decision, viz., "*That when the thing insured becomes by law (i. e., by the operation of some rule of maritime law) directly chargeable with an expense, or contribution, or loss, in consequence of a particular peril, the law treats such peril, for all practical purposes, as the proximate cause of such expense, contribution, or loss.*"

Principle of decision adopted by Mr. J. Story in this latter case.

The whole judgment will well repay a perusal. It certainly seems that the decision of Mr. J. Story is, in the language of Chancellor Kent, "well sustained by just reasoning and sound authority." (p)

The only difference, in point of fact, between the American and English case is, that in the former the amount of contribution was fixed by, and paid under, a *judicial decree*; in the latter it was merely a matter of private award and arbitration; but Mr. J. Story, after noticing this distinction, disclaims, and apparently with justice, the notion that, in point of principle, it can make any difference between the two cases.¹

(o) † *Peters v. Warren Ins. Comp.* 3 Ins. 181-190. { S. C. 14 *Peters*, (S. C.) Sumner, 389, cited at length, with the 99. }
judgment of Mr. J. Story, in 2 *Phillips on* (p) 3 *Kent's Comm.* (5th ed.) 301.
note (d.)

¹ See *Hale v. Washington Ins. Co.* 2 *Story*, C. C. 176, cited *post*, 768 and 805, in notes, in which the settlement between the ships for damages done by collision was made by compromise.

SECT. IV. *Risk of Loss occasioned by the Acts or Negligence of the Assured or his Agents.*

Risk of loss occasioned by the acts or negligence of the assured or his agents.

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Where the ship is seaworthy and properly commanded, equipped, and manned at the outset, the underwriter will be liable for all loss proximately caused by the perils insured against, though remotely occasioned by the acts of negligence of the master or crew.

§ 285. The principal established by the more recent authorities in this country is, that, supposing the vessel, crew equipments, to have been originally sufficient, and a cargo to have been provided of competent skill, the assured done all that he contracted to do; and the underwriter in such case, liable for any loss *proximately* caused by perils insured against, although it may have been remotely occasioned by the negligence or misconduct (not amounting to barratry) of the captain or crew, whether such negligence or misconduct consist in omitting some act which was to be done, or doing an act which ought not to be done in the course of the navigation. (q)

The same principle appears, at length, after much fluctuation in the decisions, to have been established in the United States. (r) ¹

(q) *Busk v. Royal Exch. Comp.* 2 B. & Ald. 72. *Walker v. Maitland*, 5 B. & Ald. 171. *Bishop v. Pentland*, 7 B. & Cr. 219. *Holdsworth v. Wise*, *ibid.* 794. *Shore v. Bentall*, *ibid.* 798. *Phillips v. Headlam*, 2 B. & Ad. 380. *Dixon v. Sadler*, 5 Mees. & Wels. 405. S. C. confirmed in error, 8 Mees. & Wels. 895. *Redman v. Wilson*, 14 Mees. & Wels. 476. *Waters v. Merchants Louisville Ins. Co.* 11 Peters, (S. C.) Rep. 213. *Suffolk Ins. Co. v. Sumner*, 197 Mass. 197. *land v. N. England Marine Ins. Co.* Metcalf, 432, 440; *Andrews v. E. & M. Ins. Co.* 3 Mason, 6, 26, 27. *liams v. Suffolk Ins. Co.* 3 Sumner 277; *Georgia Ins. & Trust Co. v. son*, 2 Gill, 365; *Perrin v. Protective Co.* 11 Ohio, 147; *American Ins. Co. v. Inaley*, 7 Barr, (Penn.) 223; *an* 765, and note; *St. Louis Ins. Co. v. Glasgow, Missouri Ins. Co.* 8 Missouri, 713, 725. The principle never been extended to the case of voluntary deviation. *Natchez Ins. Co. v. Stanton*, 2 Smedes & Marsh. 394. *Stewart v. Ins. Co.* 1 Humph. 242

(r) See 1 Phillips on Ins. chap. xiii. sect. 2, see especially p. 581. 3 Kent's Comm. (5th ed.) 300, 301, and also 306, and the learned note (e) thereto appended. The cases in the Supreme Court of the United States, which seem to have fixed the law as stated in the text, are † *Patapasco Ins. Comp. v. Coulter*, 3 Peters Rep. 222. *Columbian Ins. Comp. v. Lawrence*, 10 Peters, (S. C.) Rep. 517.

¹ "This doctrine," says Mr. Justice Story, "not only stands upon the maxim *proxima non remota spectatur*; but upon the more general ground, that the writers take upon themselves all losses by the perils insured against, without reference to the fact, whether they are attributable to the negligence or default of the master and crew, or to mere accident or irresistible force. There being an exception in the words of the policy, the policy of the law does not create one, and the owner can, in most cases, be in no better condition to guard himself against a

It may be convenient to state briefly the substance of the cases that have established this now undoubted principle.

A Russian ship, which was seaworthy at the outset of the risk, and navigated by a competent master and crew, was compelled in the course of a voyage from Amsterdam to St. Petersburg, to winter in a port in the Gulf of Finland, where she was left, as is usual under such circumstances, under the charge of the mate, who was quite sufficient for her safe custody; owing to the negligence of this person in not extinguishing a fire which he had lighted in her cabin, the ship was burnt while he was absent on board another vessel: the court held, that, as the loss of the ship was proximately caused by fire (one of the perils insured against) the underwriters were liable, though it was remotely occasioned by the negligence of the mate. (s)

The court came to the same conclusion in a case where sugars were lost in the course of being conveyed from the ship to the shore according to the usage of the West India trade, in a sloop adequately manned for the purpose, which was drifted on the rocks in consequence of the seamen in charge of her all going to sleep, in gross neglect of their duty. (t)¹

Risk of loss occasioned by the acts or negligence of the assured or his agents.

Cases in illustration of this rule.

Ship burnt while in charge of mate by his negligence.
Busk v. Royal Exch. Ass. Comp.
2 B. & Ald. 72.

Goods lost by stranding in going from ship to shore, owing to negligence of crew.
Walker v. Maitland.
5 B. & Ald. 171.
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(s) *Rusk v. Royal Exch. Ass. Comp.* 2 B. & Ald. 72. (t) *Walker v. Maitland*, 5 B. & Ald. 171.

the negligence of his agents, than he is to guard against a loss by accident or irresistible force. He does not warrant the fidelity of his agents, but merely their capacity and ability." *Hale v. Washington Ins. Co.* 2 Story, C. C. 176, 184, 185. See *post*, 605, note. In *Copeland v. N. Eng. Marine Ins. Co.* 2 Metcalf, 432, 450, Mr. Chief Justice Shaw said, — "These mistakes of judgment, and instances of negligence are incident to navigation, and constitute a part of the perils that attend it; and they can no more be restrained, prevented, or guarded against, by the owners, than by the underwriters. The most cautious foresight can only enable owners to provide a competent crew of officers and seamen at the commencement of the voyage." And in this last case it was decided, (Wilde, J. dissenting,) that, although, in case of the insanity or other incompetency of the master, occurring at a foreign port during the voyage, it is the duty of the mate to take command of the vessel, and although he has a right to resort to all lawful means to establish himself in the command; yet if, from want of judgment, or even from culpable negligence, he omits to do so, and the vessel sails under the master's command, and is stranded, the underwriters are not discharged. In this case, the insurance was on a voyage out and home, and it was conceded, that the officers and crew were competent to the performance of their duties at the commencement of the voyage.

¹ Under a policy on a cargo of tin, shipped, or to be shipped, at and from New York to Baltimore, the assured may recover a partial loss for damage by sea water, caused by the perils of the seas, though the tin was not properly dunnaged and stowed. *Georgia Ins. & Trust Co. v. Dawson*, 2 Gill, 365.

Risk of loss occasioned by the acts or negligence of the assured or his agents.

Ship bilged, owing to mate's negligence in not lashing her with proper fastenings.

Bishop v.

Pentland, 7 B. & Cr. 219.

Sailing home-

ward with ship,

originally sea-

worthy in a

state of danger-

ous leakiness.

Holdsworth v.

Wise, 7 B. &

Cr. 794.

Ship lost by

stranding, ow-

ing to captain's

sailing into har-

bor without a

pilot.

Phillips v.

Headlam,

2 B. & Ad. 380.

Ship lost by be-

ing blown over

on her beam

ends, owing to

master's impro-

perly (but not

barratrously)

heaving over

too much bal-

last.

Dixon v. Sad-

ler, 5 Mees. &

Wels, 405.

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A ship, which was obliged, owing to her being a s built vessel, to be lashed to a harbor pier, fell over when tide left her, and was stove in and stranded in consequ of the gross negligence of the mate in not procuring a of sufficient strength for the purpose : the court on the principle, held the underwriters liable. (u)

A ship insured on an entire voyage out and home, has been seaworthy and properly manned and commanded a outset of that risk, was lost on her passage home by perils of the sea ; the underwriters were held not to be charged by the captain's negligence and misconduct in sa with her on this *homeboard* passage in such a state of leak as to be obliged to be pumped out by the crew every hours. (v) ¹

A ship struck the ground and was lost in the Sierra L river by stranding, owing to the master's having enter without a pilot, after having made every reasonable att to procure one ; Lord Tenterden said, that even if the had happened in consequence of the mistake of the ma (provided he were a person of competent skill at the when the policy was made,) yet having been proxim caused by the perils of the sea, the underwriters woul chargeable : " *a fortiori*, they were so, as he appeared to acted with a sound discretion. (w)

The master of a vessel which had sailed on a voyage Rotterdam to Sunderland in a seaworthy state and prop manned and equipped, on her arriving off a point about miles from Sunderland, negligently and improperly (bu barratrously) heaved overboard so much of her ballast the vessel was, by a *sudden squall*, driven on her beam *sunk, and totally lost ; the court held, that, as this loss proximately caused by the perils of the seas, the ass might recover, though it was remotely occasioned by

(u) *Bishop v. Pentland*, 7 B. & Cr. 219.

(w) *Phillips v. Headlam*, 2 B. 380.

(v) *Holdsworth v. Wise*, 7 B. & Cr. 794. *Shore v. Bental*, *ibid.* 798, *in notis.*

¹ But see *ante*, 666, 667, and *notis.*

improper act of the master, the ship having been seaworthy, and the master and crew competent at the outset. (x)

A ship engaged in the African teak trade, was insured on a voyage "from London to Sierra Leone during her stay there, and thence back to her port of discharge in the United Kingdom." The ship had been seaworthy and properly manned and commanded at the commencement of the risk, but was so much injured at Sierra Leone, owing, as it appeared, to the unskilful way in which the natives (who are always used for the purpose in that trade) had loaded the timber on board, that, on commencing her voyage home, she was found unable to keep the sea, and was run ashore in order to prevent her sinking in the Sierra Leone river: the court, upon the same principle as in previous decisions, held the underwriters liable for this loss. (y)

This current of authorities firmly establishes the doctrine as stated in the outset; and any dicta of the judges in earlier cases, which are opposed to it, must, therefore, be considered as overruled. (z)

§ 286. In the two following cases the main question was, not as to the effect of the negligence or misconduct of the captain or crew, supposing it to have existed, but whether the circumstances were such as to show that any negligence could, in fact, be imputed.

A ship, having discharged a portion of her cargo at Stonehouse, in Plymouth harbor, and leaving to discharge the residue in Sutton Pool, another part of the same harbor, took on board a pilot, who sent ashore two of the crew in the ship's boat, to make fast another line to the shore, and cast off their former fast; these two men were immediately seized and impressed by a pressgang, who, though requested by

Risk of loss occasioned by the acts or negligence of the assured or his agents.

Ship lost by being necessarily run on shore, in consequence of a state of leakiness, occasioned by improper loading. *Redman v. Wilson*, 14 M. & Wels. 476.

Cases in which the question has been, whether negligence, in fact, existed.

Two of the crew sent ashore to make fast one line and cast off another are seized by a pressgang before they can do so, whereby the ship takes the ground; held a loss by the perils of the sea. *Hodgson v. Malcolm*, 2 Bos. & Pull. 2 N. R. 336.

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(x) *Dixon v. Sadler*, 5 Mees. & Wels. 405. S. C. affirmed in error, 8 Mees. & Wels. 885.

(y) *Redman v. Wilson*, 14 Mees. & Wels. 476.

(z) Such as the judgment of Lord Kenyon in *Buller v. Fisher*, 3 Esp. 67, and of Ch. J. Mansfield in *Hodgson v. Malcolm*, 2 Bos. & Pull. N. R. 336. < See *Goix v. Low*, 1 John. Cas. 346. *Voss v. Un. Ins. Co.* 2 John. Cas. 187. *Cleveland v. Un-*

ion Ins. Co. 8 Mass. 306. *Grim v. Phoenix Ins. Co.* 13 John. 451. *Lodovick v. Ohio Ins. Co.* 5 Ohio, 435. *Fulton v. Lancaster Ohio Ins. Co.* 7 Ohio, 25. The last two cases were overruled by *Perrin v. Protection Ins. Co.* 11 Ohio, 147. See the remarks upon *Cleveland v. Union Ins. Co.* 8 Mass. 306, in *Copeland v. N. Eng. Marine Ins. Co.* 2 Metcalf, 450, 451. And in *Williams v. Suffolk Ins. Co.* 3 Samser, 276. >

Risk of loss occasioned by the acts or negligence of the assured or his agents.

Ship lost by bilging at dock gates, owing to the negligence of the pilot in improperly fastening her there against the remonstrance of the master: held, a loss by the perils of the sea, for which the underwriters were liable, it not having been occasioned by any negligence of the master or crew. *Carruthers v. Sydebotham*, 4 M. & Sel. 77.

the master so to do, would not let them cast off the reason of which the ship took the ground, was very strained, and made a great deal of water. The majority of the court, against the opinion of Sir James Mansfield, held that no negligence could be imputed in this case, but that the loss was, as alleged in the declaration, a loss by the perils of the seas. (a)

A ship bound from Rhode Island (United States) to Liverpool, having sailed for her voyage in a state of complete equipment, on passing Holyhead took on board a pilot (as required by the *Liverpool Pilot Act*, 37 G. 3. c. 7) and also by the *general Pilot Act* then in force 52 G. 3. and under his conduct entered the river Mersey, and was wrecked opposite St. George's dock.

The master, who was then obliged to quit the vessel on business, warned the pilot on no account to let her take the ground, as, being sharp built, she could not do so with safety. The pilot, however, during the master's absence, disregarding this advice, took the ship up to the pier of St. George's dock basin, and fastened her there with a rope to the pier, with the intention she should take the ground when the tide fell; she accordingly did so, and, when the water level fell, she fell over on the side farthest from the pier with such violence that she bilged and broke many of her timbers, and lost her beam ends.

The court held that this loss could not be considered as having happened through the negligence or misconduct of the *master and mariners*; for it was, in fact, owing to the negligence of the pilot, between whom and the master there was no privity, he not being chosen by the master, but fixed upon him by the law under a penalty: and, independent of this general principle, the 30th section of the *Pilot Act* then in force, expressly provided that owners should not be prevented from recovering on a contract of insurance by reason of any neglect of a pilot taken on board under the regulations of that act. (b)¹

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(a) *Hodgson v. Malcolm*, 2 Bos. & Pull. N. R. 336.

(b) *Carruthers v. Sydebotham*, 4 M. & Sel. 77.

¹ See *Ellery v. New Eng. Ins. Co.* 8 Pick. 14; *Copeland v. N. Eng. Marine Ins. Co.* 2 Metcalf, 451, 452.

Since the principle established by the more recent authorities, it appears clear that even had the loss in these cases been attributable to the negligence or misconduct of the captain or crew, yet, as it was proximately caused by the perils insured against, the underwriters would now be held liable.

Of course, if it can be shown that the master when appointed was wholly incompetent (*c*), that the crew were insufficient (*d*), or the ship in any way unseaworthy at the outset of the risk, this is matter of defence, of which the underwriters may avail themselves under a plea of unseaworthiness.

Risk of loss occasioned by the acts or negligence of the assured or his agents.

If the master, crew, or ship, were originally deficient, this is matter of defence under the plea of unseaworthiness.

§ 287. Where the loss is not proximately caused by the perils of the sea, but is directly referable to the negligence or misconduct of the master or other agents of the assured, not amounting to barratry, there seems little doubt that the underwriters would be thereby discharged.¹

Thus—to take a case recorded by Emerigon as having actually occurred at the first breaking out of the great plague of Marseilles in 1720—where the master of a ship, part of

Where the loss is not proximately caused by perils of the sea, but is directly referable to the negligence or misconduct (not amounting to barratry) of the agents of the assured, the underwriter will be discharged from his liability.

(*c*) *Tait v. Levi*, 14 East, 481. See also (*d*) *Hunter v. Potts*, Selw. N. Pr. 1031; *Gregson v. Gilbert*, 3 Dougl. 232. Park 9th ed. *Forshaw v. Chabert*, 3 Brod. & Bingh. 158.

¹ It has been held, that if the captain and crew of a neutral vessel resist search, when it is rightfully demanded by belligerents, or attempt to rescue a vessel sent in by belligerent captors for examination, and the property, in consequence of these acts, is condemned in a belligerent court, the underwriters will not be held for the loss. *Robinson v. Jones*, 8 Mass. 536. So, in case of capture, if a loss is caused by neglect of the master to claim the property, the insurers are not answerable for the loss so caused, under a policy containing a warranty of neutrality, provided the master is, at the time of such neglect, to be considered the agent of the assured. *Vandenheuvel v. United Ins. Co.* 2 John. Cas. 158; *Gardere v. Col. Ins. Co.* 7 John. 520. See *Bohlen v. Delaware Ins. Co.* 4 Binney, 444. Where the vessel is lost or disabled, and the cargo is saved, and the master has the means and power of transhipping and sending on the cargo, a loss caused by his neglect to do so, cannot be recovered of the insurers. *Schieffelin v. N. York Ins. Co.* 9 John. 21; *Bradhurst v. Col. Ins. Co.* 9 John. 17; *American Ins. Co. v. Center*, 4 Wendell, 45, and see S. C. 7 Cowen, 504; *Ludlow v. Col. Ins. Co.* 1 John. 335; *Low v. Davy*, 5 Binney, 595. So where the ship has become disabled, and the master has sought either the port of departure, or some other, for the purpose of refitting, and has voluntarily surrendered the whole or any part of the cargo to the shipper, when he might have refitted his vessel in a reasonable time, and carried it on to its port of destination, the loss of freight on cargo so surrendered cannot be recovered of the insurers. *McGaw v. Ocean Ins. Co.* 23 Pick. 405; see *Herbert v. Hallett*, 3 John. Cas. 93; *post*, 1141, in notes. The insurers were held not liable for a loss caused by the master's neglect in leaving the ship's register on shore, in *Cleveland v. Un. Ins. Co.* 8 Mass. 308.

Risk of loss occasioned by the acts or negligence of the assured or his agents.

Ship broken up in consequence of the negligence of the assured in not repairing.
Tanner v. Bennett. Ry. & Mood. 182.

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Goods damaged by bursting of boiler-pipe, owing to captain's having filled the boiler over night in a hard frost.
Siordet v. Hall, 4 Bingh. 607.

Loss directly referable to the acts or negligence of the assured himself is not at the risk of the underwriters.

whose crew had died of the plague on the voyage, sailed i that city with a false bill of health, in consequence of wh his ship was ordered to be burnt, this misconduct was h to discharge the underwriters (e); and it is apprehended i such a decision is not at variance with the principle of English cases as above laid down.

The following English case seems to have proceeded the same ground; a ship having been driven ashore near harbor of St. Thomas (West Indies) was afterwards off very little injured, and might have been repaired but *the negligence of the agents of the assured in the island, allowed her to be condemned and broken up after two v hasty and imperfect surveys; Lord Tenterden told the j that the underwriters would not be liable for the total loss condemnation and sale, if, in their opinion, such loss been brought about by the negligence or misconduct of agents of the assured. (f)

On the same principle in an action against the owners steamer, for not delivering goods in proper time; upon appearing that the captain during a hard frost had filled boiler over night (according to custom) to prepare for st ing in the morning, in consequence of which the boiler burst, and the water escaping damaged part of the go for whose non-delivery the action was brought; Chief Jus Best and the Court of Common Pleas held, that this was "an act of God," within the excepted risks in the bil lading, but negligence on the part of the captain, for w the owners were responsible as carriers. (g)

Of course, if the loss be directly referable to the act of assured himself the underwriter will, *à fortiori*, be discharged. Thus, as we have already seen, a failure to have the properly documented, according to existing treaties, charges the underwriter from his liability, when the insurance has been effected by the shipowner, though not, as better opinion seems to be, when it has been effected by owner of the goods. (h)

(e) Emerigon, chap. xii. sect. xiii. vol. i. p. 429, ed. 1827.

(g) Siordet v. Hall, 4 Bingh. 607

(h) See above, Part II. Chap. IV.

(f) Tanner v. Bennett, Ryan & Mood. 182. See as to the S. P. Bradford v. Levy, 2 C. & P. 137. S. C. but not S. P. Ryan & Mood. 331.

8. Dawson v. Atty, 7 East, 367. 1 Carstairs, 14 East, 374.

So, a failure to navigate a ship in war time, according to the provisions of the Convoy Acts, discharges the underwriter, whenever it can be shown that the assured himself was, by his own act, instrumental in the violation of the law, or that his agent had direct authority from him for that very purpose. (i)

It is not, however, every mistake in judgment on the part of the assured or his agents that will discharge the underwriter, although such mistake may have immediately brought about the loss: if they acted, though erroneously, yet with reasonable prudence, and a *bonâ fide* desire to do the best for all concerned, he will still be liable. Thus, where a cargo of arms and ammunition having been shipped and insured from London to Madeira, the agent of the shippers at the latter place, acting under the mistaken impression that the importation of such articles was prohibited by the treaty between Portugal and Great Britain, and meaning to do the best for all concerned, informed the governor of the expected consignment, who, consequently, seized the arms and ammunition immediately on their arrival; Lord Tenterden held, that the underwriter was not discharged from his liability, on the ground that this loss was the act of the assured, for the agent had acted *bonâ fide* and with reasonable prudence. (j)

Where the loss arises from causes which the owners or masters of a ship are bound, by their duty as carriers, to prevent, or which they might have prevented by a due exercise of reasonable and ordinary vigilance, the underwriter is discharged from his liability.¹ Thus, the underwriter is liable for no loss occasioned by bad stowage (k); nor for loss sustained by the goods from rats, for which the master alone is liable, unless, as it seems from the Consolato del Mare, he has taken all the precautions he could against their ravages, as by carrying a cat on board, &c. (l)

Risk of loss occasioned by the acts or negligence of the assured or his agents.

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If, however, the loss be brought about by a mere mistake in judgment of the assured or his agents, acting *bonâ fide*, the underwriter will not be discharged. Wilbraham v. Wurnaby, Ld. & Wels. 144.

Where loss arises from causes which the owners or masters are reasonably bound to prevent, the underwriter is discharged from liability.

(i) Carstairs v. Alhutt, 3 Camp. 497.
Metcalf v. Parry, 4 Camp. 123.

(j) Wilbraham v. Wurnaby, Lloyd & Wels. 144.

(k) See Emerigon, chap. xii. sect. ii. iv.
v. who collects all the learning upon these points.

(l) Consolato del Mare, chap. lrv. lxxi.

¹ The underwriters were held not liable for a hawser lost overboard, which was stowed in the boat on deck, in Brooks v. Oriental Ins. Co. 7 Pick. 259, 269.

Risk of loss occasioned by the acts or negligence of the assured or his agents.

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Upon the same principle, the underwriter is not liable for loss occasioned by theft, (*furtum* or larceny, as distinguished from *latrocinium* or robbery accompanied with violence,) or embezzlement when committed by the crew, even although the risk of "thieves" is one of the enumerated risks in common policies; for it is considered that loss of this kind might be guarded against by the exercise of ordinary diligence on the part of the master; consequently, the master and the owner, whom he represents, are alone answerable for loss of this kind (*m*);¹ but for open robbery (*latrocinium*) underwriters are liable, and the owners also, but only for the value of ship and freight. (*n*) In the same way, if loss or damage happen in the shipping or landing of the goods through the fault of the master or crew, or the defect of the ship or tackle, the master and the owners are respectively answerable, if such loss or damage be not imputable to the master or to the defect of the ship's tackle, then the underwriters are liable. (*o*) So, the loss of goods lashed on deck is not recoverable under a general policy on goods, they are so carried by virtue of a general usage of which the underwriter must be presumed to have been familiar. (*p*)

SECT. V. *Limitation of Owner's Responsibility for Loss occasioned by the Acts or Negligence of the Master and Crew.*

Limitation of owner's responsibility for loss occasioned by the acts or negligence of the master and crew.

§ 288. With regard to the extent of the owner's responsibility to the merchant for damage caused to his goods

of the Italian translation. Emerigon, chap. xii. sect. iv. vol. i. p. 375, ed. 1827. See also 3 Kent's Comm. (5th ed.) 300, note (a). { *Ante*, 758, *post*, 803. }

(*m*) See Emerigon, chap. xii. sect. v. vol. i. p. 380, ed. 1827, and see also sect. xxix. *ibid.* p. 524. See also Boulay-Paty, tit. x. tom. iv. p. 35, ed. 1834. 3 Kent's Comm. (5th ed.) 303, note (a).

(*n*) Hartford v. Maynard, Park, 36, 8th ed. and see now 26 G. 3, c. 86. s. 2.

(*o*) Emerigon, chap. xii. sect. ii. p. 24, ed. 1827, citing Le Guide art. 7. Jugemens d'Oleron, art. donnance de Wisbuy, art. 49.

(*p*) Ross v. Thwaite, Park on 8th ed. Backhouse v. Ripley, Da Costa v. Edmunds, 4 Can Gould v. Oliver, 4 Bingham N. C. L. ward v. Hibbert, 3 Q. B. 120.

¹ But see *post*, 818, and in note.

acts of the master or mariners, it will be convenient to state, very briefly, the law in this place, although the subject does not properly fall within the scope of this work.¹

By the civil law, and also by the common law of England, the owner is responsible to the merchant up to the full extent of the amount of such loss or damage (*q*) ; and this, in fact, *is universally the rule, unless where a different one has been established by ordinances and statutes.

By the general law maritime of continental Europe, however, as expressed in several of the old mediæval sea-laws and the majority of the modern ordinances, a different rule has been established ; and the responsibility of the owners for loss occasioned by the negligent or wrongful acts of the master or mariners is limited to the *value of the vessel and freight*, and by abandoning these to the claimant the owner may discharge himself. (*r*)

With a reference, no doubt, to the provisions of the general European law maritime, but mainly with a view of encouraging the shipowning interest, upon which the common law rule frequently operated with great severity and unfairness, our legislature has at different times passed various acts in order to limit the owner's responsibility. (*s*)

By the first of these acts, which was passed in 1734 (*t*), 7 G. 2. c. 15. the responsibility of the owners was limited to the value of the ship and freight ("*the value of the ship or vessel, with all her appurtenances, and the full amount of the freight due or to*

Limitation of owner's responsibility for loss occasioned by the acts or negligence of the master and crew.

At common law the owner was responsible to the shipper to the full amount, for damage caused by the acts or negligence of the master and crew.

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By the law maritime, the owner's responsibility was limited to the value of ship and freight, by abandoning which he might discharge himself.

Acts passed at different times to limit owner's responsibility.

(*g*) Abbott on Shipping, part iv. chap. vi. { (6th Am. ed.) 394, in notes. } Emerigon, Contrats a la Grosse, chap. iv. sect. ii. vol. ii. p. 482, ed. 1827. The rule of the common law still prevails in the United States, except in Maine and Massachusetts, 3 Kent's Comm. (5th ed.) 217.

(*r*) See the learning on this point collected in Abbott on Shipping, { (6th Am. ed.) 394, 395. } Emerigon, Contrats a la Grosse, chap. iv. sect. ii. vol. ii. p. 482, ed. 1827. (who is not cited by Lord Tenterden,) clearly establishes the prevalence of the rule in mediæval maritime law. Boulay-Paty, Cours de Droit Com. Mar. tit. iii. sect. i. tom. i. pp. 263-267, gives

a very able dissertation on the subject, and the language of the art. 216. of the Code de Commerce contains the best *précis* of the continental law:—"Tout propriétaire du navire est civilement responsable *des faits du capitaine*, pour ce qui est relative au navire et à l'expédition. La responsabilité cesse par l'abandon du navire et du fret."

(*s*) As to the motives of the legislature, see the *preamble* of 7 G. 2. c. 15. The remarks of Lord Tenterden in *Gale v. Lawrie*, 5 B. & Cr. 163. and of Mr. Baron Parke in *Brown v. Wilkinson*, 16 L. J. Exch. 36.

(*t*) 7 G. 2. c. 15.

¹ See Abbott, Ship. (6th Am. ed.) 394, et seq. and in notes.

Limitation of owner's responsibility for loss occasioned by the acts or negligence of the master and crew.

26 G. 3. c. 86.

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grow due for and during the voyage") in all cases of *embezzlement by the master or mariners* without the *privity*.

By the next act, passed in the year 1785 (u), the limitation was extended to the case of *robbery committed by strangers* (i. e. persons other than the master and mariners) and by this statute it was also provided that the *owners* be wholly free from all responsibility "for loss or damage occasioned to the goods by fire on board" (v); and, that not only the *owners*, but the *masters* also, should be entirely freed from liability for loss by robbery, embezzlement, or making away with any gold, silver, diamonds, watches, jewels, or precious stones, unless the true nature, quality, and value thereof shall be inserted by the shipper in the bill of lading at the time of shipment.

53 G. 3. c. 159.

The last act upon the subject was the 53 G. 3. (passed A. D. 1812,) which carries the same limitation of the owner's responsibility still further, and declares that the owner shall not be liable *beyond the value of the ship and freight* for any loss arising "from any act, neglect, matter or thing omitted, or occasioned," without his fault or *privity*, either in relation to any goods laden on board his own ship," or "to any goods laden on board any other ship."

Result of English legislation on the subject.

The result, therefore, of English legislation on this subject is : —

1. That the *owner* is not responsible *beyond the value of the ship and freight*, in any case of robbery, embezzlement, or loss by fire, or any act done or omitted, without his *privity*, either in relation to the master and mariners, or by strangers.

2. That he is wholly exempt from all loss *by fire*, and from all loss by robbery or embezzlement of jewels, gold, or silver, where their value is not declared in the bill of lading.

3. That the *master's* liability, except in the case last mentioned, remains precisely what it was at common law.

Construction of these acts.

The following points have been decided on by the courts in the construction of the statutes : —

Mode of calculating value of ship.

The *value of the ship* is to be calculated at the time of the loss.

(u) 26 G. 3. c. 86.

(v) Sect. 2.

loss : a decision which has been regretted, but is still adhered to. (w)

The *value of the freight* is the amount which the ship *would actually have earned as freight had she arrived at her port of destination, after deducting the freight on goods jettisoned, burnt, or tortiously sold in the course of the voyage (x); but including in the calculation all moneys paid as an advance of freight. (y)

The *fishing stores* of Greenland whalers are to be valued as part of the "ship and her appurtenances" under these statutes, although they are not usually so estimated in policies of insurance unless specifically mentioned. (z)

The acts do not extend to gabbets (*gabares*) and lighters, nor to any ship or vessel not requiring to be registered. (a)

Limitation of owner's responsibility for loss occasioned by the acts or negligence of the master and crew.

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Mode of calculating value of freight.

Fishing stores of whalers are to be valued as part of ship.

Acts only apply to registered vessels.

§ 289. The liability of underwriters for loss on goods does not begin in this country, generally speaking, until they are loaded on board ship, and ceases directly they have been discharged and safely landed on the quays, or other usual landing places of the port of discharge; or into public lighters, &c., where that is the customary mode of landing them, by the usage of the port.

Period at which the liability of owners and masters, as carriers of goods, begins and ends.

The commencement and conclusion of the responsibility of the owner or master, as carriers of the goods, is not so exactly defined, but depends a good deal on the customs of the particular ports where the voyage begins and ends.

Generally speaking, however, the responsibility of the owner or master may be said to *begin* where that of the *wharfinger ends*, wherever that may be: thus, if the master receives the goods on the quay or beach, or sends his boat for them, his responsibility commences from the moment he so receives them, or puts them on board the boat. (b)

So, again, his responsibility will *cease* either by actual delivery of the goods to the consignee under the bill of lading, *or some act which, according to the practice and custom

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(w) *Wilson v. Dickson*, 2 B. & Ald. 2. See *Brown v. Wilkinson*, 16 L. J. N. S. Exch. 44.

(x) *Cannan v. Meaburn*, 1 Bingh. 463.

(y) *Wilson v. Dickson*, 2 B. & Ald. 2.

(z) *The Dundee*, 1 Hagg. Ad. Rep. 100. *Gale v. Lawrie*, 5 B. & Cr. 156.

(a) *Hunter v. M'Gowan*, 1 Bligh's Parl. Rep. 573, and see 53 G. 3. c. 159. s. 5.

(b) See *Corban v. Downe*, 5 Esp. N. P. 41, and the authorities cited in Abbott on Shipping, part iv. chap. iv. (6th Am. ed.) p. 345.

Limitation of owner's responsibility for loss occasioned by the acts of negligence of the master and crew.

usually observed in the port or place of delivery, is regarded as equivalent to or a substitute for it. (c) In fact, as it is expressed by Emerigon: *Il faut que le capitaine surveille la marchandise jusqu'à la tradition effective.* (d)

The subject was very much discussed lately in this country in the case of *Gatcliffe v. Bourne*, which went through the courts, and the effect of which is that, in order to discharge the master from his responsibility, he must allege and prove, either that he delivered the goods "to the consignee according to the express terms of the bill of lading, or that he delivered them according to the practice and custom usually observed in the port of delivery. (e)¹

SECT. VI. *Risk of Loss, by the Acts of the Government, assured.*

Risk of loss by the acts of the government of the assured.

Where the underwriter and assured are both British subjects, the former is liable for all loss caused by the public authoritative acts of the British government.

§ 290. There are two classes of cases in which loss may be occasioned by the public authoritative acts of the government of the assured: those, viz., in which the assured and the underwriter are both subjects of the same state, and those in which they are subjects of different states.

In the former class of cases it may now be taken as a settled law, that the underwriter is liable for all loss occasioned by the public acts of the home government, in detaining, arresting, or laying an embargo on the ship either in the home port or a foreign port. (f)²

(c) Per Tindal, C. J. in *Gatcliffe v. Bourne*, 4 Bingham N. C. 314. Abbott on Shipping, part iv. chap. iv. pp. 333, 334. See also 3 Kent's Comm. (5th ed.) 214. (d) Emerigon, chap. xii. sect. 37, vol. ii. p. 25, ed. 1827.

(e) *Gatcliffe v. Bourne*, 4 Bingham N. C. 314. *Bourne v. Gatcliffe*, in error, before the Exchequer Chamber, 3 Mann. & Gr. 643. S. C. before the House of Lords, 7 Mann. & Gr. 850.

(f) *Page v. Thompson*, at N. I. on Ins. 175, 8th ed. Green v. Y. Lord Raym. 840. S. C. 2 Salk. 44. also the dicta of Lord Alvanley in *teng v. Hubbard*, 3 Bos. & Pull. Kent's Comm. (5th ed) 291. The same in France, Code de Commerce 369, 370, giving the right to advance d'arrêt de la part du Gouvernement après le voyage commencé.

¹ See Abbott, Ship. (6th Am. ed.) 378 to 381, and notes.

² 3 Kent, (5th ed.) 291, 292; *M'Bride v. Marine Ins. Co.* 5 John. 299; *Wash. Phoenix Ins. Co.* 5 John. 310; *Odlin v. Pennsylv. Ins. Co.* 2 Wash. C. 1; *Delano v. Bedford Ins. Co.* 10 Mass. 347; *Ogden v. New York Fire Ins. Co.* 177; *Lorent v. S. Car. Ins. Co.* 1 Nott & M'C. 505.

*The difficulty arises in the other class of cases, viz., where the loss is occasioned by the acts of the *foreign government* of which the assured is a subject.

Risk of loss by the acts of the government of the assured.

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When the assured is a foreigner, is the underwriter liable for loss caused by the acts of the foreign government?

Lord Alvanley and Lord Ellenborough held the negative.

In this case the principle was laid down, and for a long time tenaciously adhered to by Lord Ellenborough, "that in all questions arising between the subjects of different states, *each is a party to the public authoritative acts of his own government; and on that account a foreign subject is as much incapacitated from making the consequences of an act of his own state the foundation of a claim to indemnity upon a British subject in a British court of justice, as he would be if such act had been done immediately and individually by such foreign subject himself.*" (g)

Lord Ellenborough avowedly grounded this rule upon the case of *Touteng v. Hubbard*, decided by Lord Alvanley, in the year 1802 (h), and in which it was decided that a Swedish subject was not entitled to recover in an action on a charter-party against a British subject in a British court for damages caused by an embargo laid on by the British government by way of reprisal for acts of aggression committed against us by the Swedish government. The ground on which Lord Alvanley put the case was this, that, as the aggressive acts of the plaintiff's own government were the occasion of the embargo being laid on, and as the plaintiff must be taken to be a party to the acts of his own government, the loss must be considered as having been brought about by his own fault. (i)

Touteng v. Hubbard, 3 Bos. & Pull. 291.

The leading cases in which Lord Ellenborough applied the rule thus deduced by him from the judgment of Lord Alvanley in *Touteng v. Hubbard*, were those of *Conway v. Gray*, *Conway v. Forbes*, and *Murray v. Shedden*, which all came before the court at the same time in consequence of the American embargo of 1807.

Conway v. Gray, 10 East, 536. British underwriters held not responsible for loss occasioned by American embargo where the assured were American subjects.

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*The facts, as far as they bear on the present question, were shortly these:—The policies in the two first cases were on goods; in the third case on ship. The goods and ship, after the former had been loaded aboard, and the lat-

(g) Per Lord Ellenborough in *Conway v. Gray*, 10 East, 545.

(h) *Touteng v. Hubbard*, 3 Bos. & Pull. 291.

(i) See the judgment of Lord Alvanley in *Touteng v. Hubbard*, 3 Bos. & Pull. 298–302, and the statement of the case by Lord Ellenborough in 10 East, 545.

Risk of loss by the acts of the government of the assured.

ter was just ready to sail, had been detained in their respective ports of loading and departure in the United States under an embargo (*but not by way of hostility or reprisals*) on the 22d December, 1807, by the government of the United States, on all ships in all harbors within their jurisdiction. The parties interested in the *goods* were American subjects; the party interested in the *ship* was the American consul at Liverpool. All the policies had been effected in this country before news had been received here of the American embargo, on hearing of which the assured gave notice of abandonment, and brought their action for the loss; but Lord Ellenborough and the whole Court of King's Bench held, on the principle above stated, that they could recover nothing on these policies from the British underwriters. (*j*)

This principle does not apply where the foreign assured is trading under a license.
Usparicha v. Noble, 13 East, 332.

In the next case in which this question was involved, Lord Ellenborough held that the principle upon which *Conway v. Gray*, &c. was decided did not apply to the case of an enemy who had obtained a license from the government of this country for the special purpose of carrying on the commerce which was insured in the policy on which the action was brought, and in the course of prosecuting the thing insured was captured and condemned by the act of his own government. (*k*)

By the license, his lordship observed, the assured was to be regarded, for the purpose of carrying on the licensed commerce, as virtually an adopted subject of this country; so that the argument to be drawn from an implied participation in the acts of his own government, was wholly excluded. (*l*)

This qualification of the doctrine was established in error in the case of *Flindt v. Scott*, 5 Taunt. 677.

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In three subsequent cases, however, in which precisely the same question was substantially involved, his lordship returned to the position he had thus laid down in *Usparicha v. Noble*, declaring that if the principle upon which that case was decided should be irreconcilable with that acted upon in *Conway v. Gray*, he would relinquish the one and adhere to the other. (*m*)

(*j*) *Conway v. Gray*, 10 East, 536. *Conway v. Forbes*, *ibid.* *Murray v. Shedden*, *ibid.*

(*l*) See dicta of Lord Ellenborough, 10 East, 342.

(*m*) *Menett v. Bonham*, 15 East, 322. *Flindt v. Crokatt*, *ibid.* 322. *Flindt v. Scott*, *ibid.* 323.

(*k*) *Usparicha v. Noble*, 13 East, 332.

These cases were brought, upon a writ of error, before the Exchequer Chamber, and there solemnly reversed, and the doctrine of *Usparicha v. Noble* decisively established. (n)

The general doctrine, however, of *Conway v. Gray*, though not directly touched by this decision, was subsequently shaken to its foundations, if not altogether overturned, by what fell from Lord Ellenborough himself, and still more from the Court of Error, in giving judgment in the case of *Simeon v. Bazett*, where the court had to consider the general question how far the subject of a foreign state, not in open hostility with the British government, was responsible, apart from all considerations of license, for loss occasioned by the aggressive acts of his own government.

In this case the insurance was effected in 1810, on ship and goods, the property of Prussian subjects, to cover a trading voyage to Colberg, in Prussia, or any other Baltic ports which the ship, in the then disturbed state of our political relations with the Northern powers, might be able to enter. Prussia was not at that time in a state of open hostility to this country, but, under the influence of Napoleon's continental system, all direct intercourse was prohibited between her ports and those of Great Britain; and the only way in which the trade could be carried on was by means of simulated papers. The policy on which the action was brought was adapted to this state of things, giving the most extensive liberty to discharge at all ports, to carry simulated papers, &c.; it was declared to be on *all risks*, and the premium was fixed at *forty guineas per cent.*

*The ship, with simulated papers and false clearances, sailed from London for Colberg, and on arriving near that port, was seized by the Prussian government, under the authority of the Berlin decree.

The underwriters contended that, as this seizure was the act of the government of the assured, they were not liable.

But Lord Ellenborough said, that "the exclusion of risk occasioned by the act of the assured's own government was only an implied exclusion from the reason and fitness of the thing, which, however, might be rebutted by circumstances," And in the present case his lordship held that as, from the

Risk of loss by the acts of the government of the assured.

Where, from the whole facts of the case, it is plain that the British underwriter means to take on himself the risk of loss by the acts of the foreign government, he shall be liable for such loss. *Simeon v. Bazett*, 2 M. & Sel. 94.

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(n) *Flinck v. Scott*, in error, 5 Taunt. 711. *Huttnan v. Whitmore*, 3 Maule & Sel. 337. See also *Anthony v. Moline*, *ibid.*

Risk of loss by the acts of the government of the assured.

whole character of the transaction,—from the terms of policy, the well-known nature of the trade, and the enormous rate of premium,—*it was clear that the underwriters insured against the risk of Prussian capture, that risk covered by the policy.* (e)

The ground, therefore, upon which Lord Ellenborough rested his judgment was, that the assured, under the peculiar circumstances of the case, were not responsible for loss by the acts of their own government, because upon the facts it must be inferred that the underwriters had taken upon themselves the risk of such loss.

The Court of Error, in *Bazett v. Meyer*, gave up the whole doctrine.

In the Exchequer Chamber, however, Chief Baron Thomas, who delivered the judgment of the court, expressly disclaimed proceeding on any grounds peculiar to the case, and based the decision of the court on the broad ground which he said was intended to have been laid down in the former case of *Flincht v. Scott*, viz. *that it was no objection to the plaintiff's recovery, that the loss happened by the act of government of the assured.* (p)

But it was again acted upon in *Campbell v. Innes*, 4 B. & Ald. 423.

It might have been supposed that the question was set at rest in English law, but in a subsequent case, where an American subject, on the eve of the last war between Great Britain and America, (but before the breaking out of hostilities was known here,) had effected an insurance on his goods, his property, with a British underwriter, “*against all risks, American seizure included*”—Lord Tenterden in the Court of King's Bench held, that as the fact of the assured being an American, had not been disclosed to the underwriter, the assured could not recover in this country for a loss caused by American seizure, even after the restoration of peace. (q)

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Remarks on *Campbell v. Innes*.

The case proceeded mainly upon the ground of concealment, but partly also on the ground that the assured could not recover for loss caused by the acts of his own government unless it plainly appears that it was in the distinct contemplation of both parties to insure against that very risk, and the court seem to have considered, that though the

(e) *Simeon v. Bazett*, 2 Maule & Sel. 94.

(q) *Campbell v. Innes*, 4 B. & Ald. 423.

(p) *Bazett v. Meyer*, 5 Taunt. 839, 840.

(r) See the remarks of Mr. J. B. Ald. 425.

of *American* seizure was expressly assumed by the underwriters on the face of this policy, yet, as they were not told and did not know that the assured was an American, they had not distinctly taken upon themselves the risk of loss caused by the acts of the government of the assured.

Risk of loss by the acts of the government of the assured.

This case certainly seems to re-establish the principle acted upon by Lord Ellenborough in *Simeon v. Bazett*, viz. that an English underwriter is never liable for loss arising from the acts of the foreign government of the assured, unless the peculiar circumstances of the case, or form of the policy distinctly shows that he meant to insure against such risk.

In the United States, the whole question has come before the consideration of the supreme court of Errors in New York, and it has there been held, agreeably to the declared principle of decision acted upon by the English Exchequer Chamber in *Bazett v. Meyer*, that a subject is not to be deemed a party to the legislative acts of his own government, so as thereby to deprive him of remedy on a policy effected by foreign underwriters in respect of losses caused by such acts. (s)

In the United States the doctrine is abandoned.

*SECT. VII. *Risk of Loss of Voyage by Interdiction of Commerce, or Blockade or Embargo of the Port of Destination.*

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§ 291. In the law maritime of every country except our own, the compulsory abandonment of the voyage, occasioned by the interdiction of commerce with the port of destination, after the commencement of the risk, or by its hostile occupation, embargo, or blockade, is considered to be a risk covered by the policy, and recoverable either as caused by "a restraint of princes," within the true meaning of those words in the common printed forms (t); or under the words "compulsory change of voyage," which are introduced into the majority of the foreign policies. (u)

Risk of loss of voyage by interdiction of commerce, or blockade or embargo of the port of destination.

Loss of voyage by interdiction of trade, embargo, or blockade of the port of destination, is not a risk covered by English policies in the common form: *alter* in foreign policies.

In this country, however, it has been repeatedly decided, and must now be taken as clear insurance law, that neither

(s) † *Francis v. Ocean Ins. Comp.* 2 vol. i. p. 533. ed. 1827. See also 3 Kent's Wendell, 64, cited 3 Kent Comm. (5th ed.) 292-294, and 1 Phillips Comm. (5th ed.) 292-294, and 1 Phillips on Ins. 651-675, giving the American authorities.

(t) Emerigon, as usual, is the great source of learning on the point, see chap. xii. sect. 31. *Interdiction de Commerce*,

(u) *Vaucher, passim.*

Risk of loss of voyage by interdiction of commerce, or blockade or embargo of the port of destination.

Principle on which this rule of English insurance law proceeds.

interdiction of trade at the port of destination after risk commenced, nor interception of the voyage by blockade, or imminent and palpable danger of capture or seizure, and a risk for which English underwriters are answerable the common form of policy, either as an "arrest, restraint or detention," or in any other way whatever. (v)

The principle on which these decisions rest, is the *causa proxima non remota spectatur*: "the cause of loss be a peril acting upon the subject insured, *immediately not circuitously*;" as is held to be the case where the arises from the ship's being prevented from completing voyage by the impossibility of entering her port of destination without being captured.

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*The first case on the subject was *Hadkinson v. Robinson* before Lord Alvanley, of which the material facts were as follows:—

Hadkinson v. Robinson, 3 Bos. & Pull. 388.

A cargo of pilchards was insured, "*free of average*," English ship from the coast of Cornwall to Naples. On voyage, while sailing under convoy, intelligence was received that all the ports of Naples were shut against English vessels upon which the commodore of the convoy ordered this amongst others, into Port Mahon, in Minorca, where the intelligence being confirmed, her cargo was surveyed and being found damaged, was sold under circumstances which do not concern the present inquiry. The assured, who abandoned, claimed a total loss; but Lord Alvanley, from all considerations as to the state of the cargo when (which has no bearing on the present point,) held the underwriters were not liable, on the ground, as stated by the lordship, that "Where underwriters have insured against capture and restraint of princes, and the captain *learned* if he enter the port of his destination the vessel will be liable to confiscation, avoids that port, whereby the object of the policy is defeated—such circumstances do not amount to a peril operating the total destruction of the thing insured."

"The doctrine (that the assured might abandon in respect of a loss of voyage) is only applicable," said his lordship "to cases in which the loss is *occasioned by a peril in*

(v) *Hadkinson v. Robinson*, 3 Bos. & Pull. 388. *Lubbock v. Rowcroft*, 5 Esp. 22, and 2 Camp. 259. *Forster v. Blackenhagen v. London Ass. Comp.* 11 East, 205.

against ; which, as it appears to me, must be a peril acting upon the subject insured, immediately, and not circuitously as in the present case." (w)

This decision has been implicitly followed by the English courts in all subsequent cases of the same kind.

Thus, where in an insurance on goods bound to *Messina*, the ship having arrived at Port Mahon, found that Messina was in the hands of, or blockaded by, the French, and the assured on goods consequently gave notice of abandonment, and *went for a total loss — Lord Ellenborough, on the above grounds, held that he could not recover. (x)

So, where under a policy on goods from London to *Revel*, the ship, which had passed the Sound, and was sailing under convoy towards Revel, was turned back by the commodore on receiving intelligence that an *embargo* was laid on all British ships in Russian ports ; and afterwards, finding the intelligence confirmed, wholly gave up her voyage and sailed back for England with the convoy, but foundered at sea on the passage : Lord Ellenborough, on this state of facts, held that the assured could not recover. (y)

Goods having been insured from Bristol to Monte Video, or any other port in the river Plate possessed by the English, the ship, immediately on her arrival out, was ordered away by the English commander of *Maldonado* (the only one of the three ports of the Plate then left in the hands of the English) ; the ship, thus turned away, being in want of water and repairs, put into Rio Janeiro, the nearest friendly port, for that purpose, and on the way the goods were sea damaged : Lord Ellenborough would not even hear it argued that the assured could recover in respect of any loss after the ship had been turned away. (z)

So, where a British ship, bound and insured for St. Petersburg, was detained in the Baltic by the commander of the British convoy there, from apprehension of *Russian embargo*, until the embargo actually was laid on, and the further prose-

Risk of loss of voyage by interdiction of commerce, or blockade or embargo of the port of destination.

Lubbock v. Rowcroft, 5 Esp. 49.

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Blackenhagen v. London Ass. Comp. 1 Camp. 453.

Parkin v. Tunnno, 11 East, 22.

Forster v. Christie, 11 East, 205.

(w) *Hackinson v. Robinson*, 3 Bos. & Pull. 398. Nothing turned in this case on the allegation of the loss which was specially set forth in the declaration according to the facts as stated.

(x) *Lubbock v. Rowcroft*, 5 Esp. 49.

(y) *Blackenhagen v. London Ass.*

Comp. 1 Camp. 453. The loss, in this case, was laid in one count "by capture," in another "by perils of the sea."

(z) *Parkin v. Tunnno*, 11 East, 22. The loss, in this case, was averred to be "by perils of the sea."

Risk of loss of voyage by interdiction of commerce, or blockade or embargo of the port of destination.

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The rule in the United States is different.

cution of the adventure became impossible, and the voyage lost, although if the ship had been suffered to proceed with detention by the convoy, she might, in fact, have saved embargo; Lord Ellenborough held, with the same refusal to hear the point argued as in the last case, *that the underwriters were not liable to the assured, who had duly abandoned, for a total loss. (a)

In our law, then, the position is clearly established, that interdiction of commerce with the port of destination, means of a blockade, or embargo, or possession of the port by an enemy, is not a peril within the policy.

Whether, if the question were *res integra*, this decision could be upheld as a sound application of the principles of insurance law, is another question.

The position may, it seems, be regarded as abandoned in the jurisprudence of the United States; and the doctrine now supported by the highest authority there, is, that where the further prosecution of the voyage is rendered hopeless by blockade, embargo, or interdiction of commerce with the port of destination, and the voyage is accordingly wholly abandoned, that is a loss, by restraint of principle within the policy (b); and the law is the same when the loss of the voyage is occasioned by a just fear of capture, where the danger thereof is imminent, as well as apparently remorseless and morally certain. (c) ¹

(a) *Forster v. Christie*, 11 East, 206. See also *Chancellor Kent*, 3 Comm. (5th ed.) 293. The loss was averred to be, in one count, "(b); and see the case of *Craig v. U. Ins. Comp.* 6 John. 226, with the statement of the court given at length in *Phillips on Ins.* 662-665. (c) 3 Kent's Comm. (5th ed.) 294. (a).

(b) See the authorities, cited by Chan-

¹ In *Andrews v. Essex F. & M. Ins. Co.* 3 Mason, 21, Mr. Justice Story said: "The fair result of the cases in England and in Massachusetts is, that a denial of entry or an interdiction of commerce at the port of destination is not a risk within the common policy. The decisions in New York do indeed maintain a different doctrine. The Supreme Court of the United States has held that a restraint by blockade of the commencement of the voyage is a peril within the policy; and it was also decided in conformity with the English cases, that the breaking up of the voyage from fear of capture, because the port of destination was shut, is not a peril within the policy. It was there said, 'that the underwriter does not warrant, that the vessel shall be permitted to trade at the port of destination; but only that notwithstanding the perils insured against, the vessel shall proceed to such port.' But this language was

Although, however, loss thus occasioned is not recoverable under the common printed form of English policies, parties may by written clauses protect themselves against it; as, for instance, by stipulating that the ship, if turned away from the port of destination, shall be at liberty, without prejudice to the insurance, to make the nearest friendly port: or the risk of compulsory abandonment of voyage to the port of destination by reason of blockade, embargo, or enemy's occupation, might be inserted as a specific risk, in addition to those ordinarily insured against. (d)

Risk of loss of voyage by interdiction of commerce, or blockade or embargo of the port of destination.

Special clauses may be inserted in English policies so as to include this risk.

(d) See *Naylor v. Taylor*, 9 B. & Cr. 718. { *Fergusson v. Phoenix Ins.* 5 Binney, 544. }

in a case where the underwriters were expressly exempted from losses by illicit trade; so that it is in no degree different from that held in *Suydam v. Marine Ins. Co.* in New York, 1 John. 181." The doctrine of the courts of Massachusetts above alluded to will be found in the following cases, where it is decided, under policies containing insurance against the common risks, namely, of enemies, men of war, taking at sea, arrests, restraints, and detentions of all kings, princes, &c., that the discontinuance or abandonment of a voyage, through fear of capture, furnish no cause of abandonment, or claim for a total loss, whether such capture be or be not insured against. *Richardson v. Maine F. & M. Ins. Co.* 6 Mass. 102; *Cook v. Essex Fire & Mar. Ins. Co.* 6 Mass. 122; *Amory v. Jones*, 6 Mass. 318; *Lee v. Gray*, 7 Mass. 349; *Tucker v. United F. & M. Ins. Co.* 12 Mass. 288. The same court has extended the doctrine of the preceding cases to that of a vessel prevented from leaving port by the danger of capture. *Brewer v. Un. Ins. Co.* 12 Mass. 170. The New York cases establishing the different doctrine above alluded to are, *Schmidt v. United Ins. Co.* 1 John. 249; *Craig v. United Ins. Co.* 6 John. 226; *Corp v. United Ins. Co.* 8 John. 277; *Saltus v. United Ins. Co.* 15 John. 523. The doctrine of the Supreme Court of the United States on this subject will be found in *King v. Delaware Ins. Co.* 6 Cranch, 71; S. C. 2 Wash. C. C. 300; *Oliver v. Union Ins. Co.* 3 Wheat. 183; *Smith v. Universal Ins. Co.* 6 Wheat. 176; *Symonds v. Un. Ins. Co.* 4 Dallas, 417; S. C. 1 Wash. C. C. 182; *Williams v. Suffolk Ins. Co.* 13 Peters, (S. C.) 415. The subject was somewhat discussed in *Savage v. Pleasants*, 5 Binney, 403; *Thompson v. Read*, 12 Serg. & Rawle, 440. See *Vigers v. Ocean Ins. Co.* 12 Louis. 362. Mr. Chancellor Kent says, "It would be unreasonable to require the insured to rush into danger with moral certainty of loss. There is no doubt about the general principle, that if the voyage be relinquished merely through fear of capture, the loss is not covered by the policy. The apprehension of capture, or of any other peril *in transitu*, is no ground of abandonment. But a just fear of one of the perils insured against has been deemed equivalent to the presence of *vis major*, when that is applied directly and effectually, as in the case of a blockading squadron, so as to break up the voyage. The danger was imminent, and might be said to be present and palpable, as well as apparently remediless and morally certain. If, therefore, the danger be so great as to amount to almost a certainty of capture, it becomes a restraint in contemplation of the policy, and this is the doctrine best supported by authority." 3 Kent, (5th ed.) 293, 294.

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*SECT. VIII. *Risks of Foreign Smuggling or Inter-Trade.*

Risk of foreign
smuggling or
interloping
trade.

§ 292. Unless the policy contains an express exclusion against the risks of illicit trade, the underwriter is liable for any loss that may arise from the attempted violation of the revenue laws of *foreign states*: provided, that is, he is shown, either in fact or by implication, to have been in possession of the intention, on the part of the assured, to carry on clandestine trade, as, from the form of the policy it appears, the knowledge he, as underwriter, is presumed to possess of the known laws of the place to which the ship and goods are insured, and of the general usages of foreign trade. (

The rule, in fact, is, that the underwriter, in the absence of any express stipulations to the contrary, will be answerable for the risk of an intentional violation of *foreign trade laws* as far, but only as far, as he is directly proved, or it may fairly be presumed, to have been cognisant of the intention of violating them.¹

Thus, if the subject insured be *specifically described* in the policy, and be an article, the import or export of which is notoriously prohibited by the trade laws of the country from whose ports it is insured, the underwriter is liable for the loss caused by its seizure or forfeiture.²

Thus, where a policy was effected in France "for the exportation of *stuffs*," from Spain to a French port, the exportation of such goods being notoriously prohibited by the revenue laws of Spain, the underwriter was held liable for loss occasioned by their seizure in Spain. (f)

(e) Emerigon, chap. xii. sect. 51, vol. ii. p. 30, *et seq.* ed. 1827. *Planché v. Fletcher*, Dougl. 268. *Lever v. Fletcher*, Marshall on Ins. 56. See also 1 Phillips on Ins. 677, *et seq.* (f) Valin, Comment. tit. ii. De l'Ordonnance, and the opinion of Emerigon there given, see vol. ii. p. 1829.

¹ *Ante*, 707.

² See *Howland v. Commonwealth Ins. Co.* Anthon, N. P. 26.

*SECT. IX. *Risk of loss by subsequent Events.*

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§ 293. It is a general principle, which applies to all the risks assumed by the underwriters, that they continue liable for all losses by the perils insured against, although those perils are greatly enhanced by events that the assured could not prevent.

Risk of loss by
subsequent
events.

Thus, if capture is one of the perils insured against, and after the policy be made the risk of capture is greatly increased by the breaking out of war, it is clear insurance law that the underwriters, nevertheless, continues liable, for the risk of the declaration of war is considered to be one of the perils he assumes. (g) ¹

SECT. X. *Liability of the Underwriter on one Subject of Insurance for Loss on, or on Account of another.*

§ 294. As a general principle, the underwriter on one subject of insurance has nothing to do with losses, charges, or contributions imposed upon it by reason, or on account of, another.

Liability of the
underwriter on
one subject of
insurance for
loss on, or on
account of,
another.

Thus, the underwriter on *goods* has nothing to do with *freight*; all that he insures being the safe arrival of the goods: hence, it is a well established principle in the law of marine insurance that, though sea-damaged goods, if they arrive in specie or in bulk, pay the same freight as though they arrived sound, the underwriter on *goods* cannot be charged with the detriment the merchant thus sustains by having to pay the same freight on a diminished value (h), nor can he be charged with any *pro rata* freight the merchant may have to pay the shipowner (i); although it seems *doubtful whether he may not be charged, under certain circumstances, with the *increased freight* which the merchant is

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(g) *Planché v. Fletcher*, Dougl. 251.(i) *Baillie v. Mondigliani*, Park on Ins.(h) *Benecké*, Pr. of Indemnity chap. i. 117, 8th ed.¹ *Saltus v. United Ins. Co.* 15 John. 323.

Liability of the underwriter on one subject of insurance for loss on, or on account of, another.

obliged to pay the shipowner in cases of transshipment, v the freight by the substituted, exceeds that by the original ship. (j) ¹

On the same principle, the underwriter on *goods* can be called on to make good loss incurred by a forced sale of the goods for the repair of ship (k); nor the underwriter the ship for expenses incurred by the detention of *goods*. (l)

If, indeed, the same casualty that destroys or damages one subject of insurance, thereby also causes a total or partial loss upon another, the underwriters on the latter subject of insurance are chargeable for the loss thus caused. [The perils of the seas that destroy or swallow up ship goods, give a direct claim to a total loss against the underwriters on the freight or the profits, the earning of which has been rendered impossible by the direct effect of the casualty. (m)]

(j) See *Shipton v. Thornton*, 9 Ad. & Ell. 336, 337, and see *post*, Chapter on Particular Average. (l) *Bradford v. Levy, Ry. & Co.*, 11 Ad. & Ell. 331.

(k) *Powell v. Gudgeon*, 5 Maule & Sel. 431. (m) See *post*, Chap. VII. Sect. Absolute Total Loss on Freight. *Sarqy v. Hobson*, 4 Bingh. 131.

¹ That the underwriter on goods, may be held liable for this increased freight in the following cases go far to establish. *Searle v. Scovell*, 4 John. Ch. 218; *D. Union Marine Ins. Co.* 17 Mass. 471; *Mumford v. Com. Ins. Co.* 5 John. 263; *Abbott, Ship.* (6th Am. ed.) 365, in note; 3 Keat. (5th ed.) 338; *Shultz v. L. B. Monroe*, 336.

*CHAP. II.

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LOSSES BY THE PERILS INSURED AGAINST.

THE clause in our English policies, enumerating the “adventures and perils” against loss by which the underwriters undertake to indemnify the assured, is as follows : —

“Touching the adventures and perils which we, the assurers, are content to bear, and do take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, quality, or condition soever, barratry of the masters and mariners, and of all other perils, losses, or misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes, and ship, &c., or any part thereof.”

These words, though massed together with very little regard to methodical arrangement, have been found, in practice, to comprehend almost every kind of disaster and casualty which can possibly befall a marine adventure in the course of a sea voyage. Clauses very little varied from our own in point of form have been inserted with a similar object into the policies of all other mercantile states. (*a*)

We will consider in order :—

Sect. I. Loss by perils of the sea.

Sect. II. Loss by fire.

Sect. III. Loss by hostile capture or seizure.

Sect. IV. Loss by arrests, detentions, and embargoes.

Sect. V. Loss by pirates, robbers, and thieves.

Sect. VI. Loss by barratry of master and mariners.

Sect. VII. Losses by “other perils and misfortunes.”

Sect. VIII. Losses which are the necessary or legal consequence of the perils insured against; as salvage, expense of repairs, and other necessary disbursements.

(*a*) See them collected by Vaucher, *sured* as expressed in the policies of every Guide to Marine Insurance, in the first nation.”
table of his appendix, entitled “Risks in-

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*SECT. I. *Loss by the Perils of the Seas.*

Loss by the
perils of the
seas.

What is includ-
ed under the
words perils of
the seas.

§ 295. Of all the causes of loss enumerated in our mon policies, the most frequent and important are comprised under the term "Perils of the Seas."

Under these words are embraced all kinds of marine ualties, such as shipwreck, foundering, stranding, &c. ; every species of damage done to the ship or goods at se the violent and immediate action of the winds and wave distinct from that included in the ordinary wear and te the voyage, or directly referable to the acts and neglig of the assured as its proximate and sole conducive cause

We will proceed to consider the different cases of proximately caused by the perils of the sea.

Foundering at
sea.

FOUNDERING AT SEA, when proximately caused by the of storms and tempests, is an obvious case of loss by the y of the seas. The only difficulty that can arise is, as to *proof* of the loss, in cases where the ship founders out at either with all the crew on board, or after the crew, to their lives, have left her in boats, or in another ship.

Presumptive
proof of, from
ship's not being
heard of.

In such cases it is presumed, if a ship has not been h of at all, *for a reasonable time* after sailing, or after she last seen, that she has foundered at sea, so as to suppu count for loss by perils of the seas.²

The period of time after which this presumption shall effect, is positively fixed, for voyages of different length duration, by the laws of many continental states.

Periods after
which ship shall
be presumed
lost, fixed in for-
eign, but not in
English law.

Thus the French Code de Commerce fixes it at a pe of *one* year for ordinary, and *two* years for distant voya declaring, also, with regard to time policies, that the lo such cases shall be presumed to have taken place within limits of the risk. (*b*)³

(*b*) Code de Commerce, art. 375, 376. see Pothier, *Traité d'Assurance*, Nc For the French law on the point generally, 123. Valin, *Comment* on tit. iv. a

¹ See *The Schooner Reeside*, 2 Sumner, 567, 571 ; 3 Kent, (5th ed.) 299, 300 notes ; Abbott, *Shipp*. (6th Am. ed.) 384, in notes.

² See *Paddock v. Franklin Ins. Co.* 11 Pick. 227, 237 ; *Gordon v. Bow John*. 150.

³ This is a question for the jury upon a consideration of all the circumstances of our law. *Brown v. Neilson*, 1 Caines, 525 ; *ante*, 411 and 755, in notes.

*The result of this last provision is, that in the case of a missing ship, the loss, in the modern law of France, is presumed to have happened immediately after the last news. Thus, if a ship be insured for three months, and not being heard of, a further insurance is then made for a year, and the vessel is *never* heard of, in that case the *first* insurer pays the loss. (c)

Loss by the perils of the seas.

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In our law no fixed periods are established after which a ship not heard of shall be deemed to have perished at sea ; but each case is left to depend on its own circumstances, and the judgment of practical men.

The following points have been decided on this head : —

A ship insured "from *North Carolina to London*," had not been heard of for *four years* after she sailed, when the action was brought. This was held sufficient presumptive proof of an averment in the declaration, that the loss had happened "*by her sinking at sea*." (d)

Cases showing after what time a ship shall be deemed lost in English law. *Green v. Browne*, 2 Str. 1199. *Houstman v. Thornton, Holt*, N. P. 242.

A ship insured from *Havana to Flanders*, a voyage the average length of which is seven weeks, had not been anywhere heard of for *nine months* afterwards, when the action was brought : this was held sufficient proof of *foundering at sea*. (e)

In order, however, to lay a foundation for any presumption of this kind, it must be proved that the ship, when she left the port of departure, was really bound for and sailed on the *voyage insured*. (f) It is not, however, requisite, in order to support the presumption when once founded, to call witnesses from the *foreign outports* to prove the fact that the ship has never been heard of *there*. Thus, where a ship sailed on a voyage from Liverpool to Miramichi in Nova Scotia, and thence to Hayti, it was held unnecessary to call witnesses from Miramichi to support the averment that the ship, before reaching Miramichi, had been lost by the *perils of the sea*. (g)

It must be shown that ship sailed on the voyage insured. *Cohen v. Hinckley*, 2 Campb. 51. But if this be proved, it is not necessary to call witnesses from abroad to prove that she has never arrived. *Twemlow v. Oswin*, 2 Campb. 84.

of the Ordonnance de la Marine. Emerigon, chap. xiv. sect. 4, vol. ii. p. 141 — 149, ed. 1827, with the Commentary of Boulay-Paty.

(c) Boulay-Paty, Cours de Droit Com. Mar. tom. iv. p. 246.

(d) *Green v. Browne*, 2 Strange, 1199, at N. P. before C. J. Lee. See also *Newby v. Read, Marshall on Ins.* p. 490.

(e) *Houstman v. Thornton, Holt's N. P. Rep.* 242.

(f) *Cohen v. Hinckley*, 2 Campb. p. 51. *Koster v. Innes, Ry. & Mood.* 333.

(g) *Twemlow v. Oswin*, 2 Campb. 84. In this case the only witness called was the clerk of the owners, who swore the ship had never been heard of since she sailed.

Loss by the
perils of the
seas.

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Even though
the crew or
part of them
may have been
saved, they
need not be
called.
Koster v.
Reed, 6 B. &
Cr. 19.

*If it be proved that the ship sailed for a given port, fact of her never having arrived there (supposing a reasonable time for such arrival to have elapsed before action brought coupled with the prevalence of a report at her port of departure that she had foundered at sea, will be sufficient *pro facie* evidence of a loss by the perils of the seas; and although the crew may have been saved, it will not in the first instance be necessary to call any of them to corroborate by direct evidence, the presumption thus raised, nor to show that plaintiff could not procure their attendance, especially in the case of a foreign ship. (*h*) This case seems to dispose of the point which was left undecided in the *Nisi Prius* decision of *Koster v. Innes*, viz., whether the non-arrival of ship at the port of destination is evidence of loss by foundering, where the crew have been heard of after the vessel sailed, and after she is supposed to have been lost. (*i*)

Shipwreck is a
clear peril of the
sea.

§ 296. SHIPWRECK, when caused by the ship's being driven ashore, or on rocks and shoals in the mid-seas, by the violence of the winds and waves, is also a clear case of loss by perils of the seas.

Shipwreck, as it regards its effect upon the ship, and the right of the assured to give notice of abandonment, recover as for a total loss, is of different kinds.

Different kinds
of shipwreck,
as they affect
the mode in
which, and the
amount to
which, the as-
sured is entitled
to recover.

A ship may either be *wrecked in pieces* — i. e. so shattered and dislocated as to become a mere congeries of planks, — or to have her materials floating about on the waves, having all the form and construction of a ship. In such case *Emerigon* expresses it, "*Quoique les débris du navire : fragé existent, le navire n'existe plus :*" it is a clear case of total loss, without notice of abandonment.

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Or the ship, without being thus, as a ship, totally destroyed may yet be so shattered and injured by the casualty, as to be irreparable for the purpose of navigating the seas *again, except at a cost greater than her worth when repaired: in such case, also, the loss is considered total, at all events, on giving notice of abandonment.¹

(*h*) *Koster v. Reed*, 6 B. & Cr. 19.

(*i*) *Koster v. Innes*, Ry. & Moore
Abbott.

¹ The general rule in the United States is, that the assured may abandon

Or again, the ship, though much broken and shattered, may still retain her form as a ship, and be capable of being repaired for a sum less than her value when repaired; in which case the assured will be entitled to recover as for a total loss, if he gives *and the underwriters accept* notice of abandonment: otherwise, only for an average loss.

Loss by the perils of the seas.

In all these cases alike, however, — though the *amount of damage*, and the mode in which the assured acquires a right to indemnity, either in proportion to the actual damage or for the full amount of the insured value, is different, — yet all alike fall within losses by “*perils of the seas*.” (j)

§ 297. “STRANDING,” either in the more proper and technical sense of that word, or in its more extensive signification, as descriptive of any mode in which the ship may take the ground, is open to the same observations as the case of shipwreck; *i. e.* in proportion to the degree of damage caused, it may give rise either to a claim for a partial loss, or for a constructive total loss by virtue of abandonment; but in every case is a loss by the perils of the seas, for which the underwriter is liable, unless it falls within the range of any of those principles by which his responsibility is limited.

Stranding as a peril of the sea.

The inquiry whether the ship has taken the ground under such circumstances as to constitute “*a stranding under the common memorandum*,” so as to make the underwriters liable for an average loss on the *enumerated articles*, stands on a different footing from the question whether the damage occasioned to the ship by the same casualty is a loss “*by the perils of the seas*.” (k)

The word “stranding,” in the common memorandum, has a peculiar meaning, which will be considered elsewhere.

*In the former case, as we shall presently see, *if the ship takes the ground in the usual course of the voyage, and without the intervention of any extraordinary casualty*, this is looked

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Stranding is not a loss by the perils of the seas, unless it takes place in the ordinary course of the voyage.

(j) The different degrees of shipwreck (*navfrage, bris absolu, bris partial, echouement avec bris, echouement sans bris, &c.*) are very accurately defined in French law. The best explanation I have met with of these different terms is in Boulay-Paty, Cours de Droit Com. Mar. tom. iv. tit. x. sect. 16, p. 121, ed. 1834.

(k) See the language of Lord Tenterden in *Wells v. Hopwood*, 3 B. & Ad. p. 35, 36.

Loss by the perils of the seas.

Ship damaged by taking the harbor ground in the regular course of the voyage, is a loss by the perils of the seas. *Fletcher v. Inglis*, 2 B. & Ald. 315.

Damage caused to ship by being blown over in a graving dock while repairing, is not a loss by perils of the seas. *Phillips v. Barber*, 5 B. & Ald. 161.

Damage caused by ship's bilging while hove down on beach for repairs, is not a loss by perils of the seas, though caused by the

upon as an event the occurrence of which the underwriter must have calculated, and upon which, consequently, he would not have risked his liability for partial losses on perishable commodities. Where, on the other hand, the inquiry is whether the damage sustained by the ship's taking the ground is rightly described as a loss *by the perils of the seas*, it should seem that it will not be so regarded unless the accident have taken place in the usual course of the voyage.

Thus, where a transport in government service, insured by a time policy for twelve months, was, within the limits of the time, and in the course of such service, taken into Boulogne harbor, where on the ebbing of the tide, the harbor bottom being hard and uneven, she received damage by taking the ground, this was held to be a loss by the perils of the seas. (l) ¹

Where, on the other hand, a ship was damaged owing to her being blown over by a violent gust of wind, in a graving dock into which she had been put for repairs, after having discharged her outward cargo at her port of delivery, and in which there was only from two to three feet of water when the loss happened: this was held not to be a loss by the perils of the seas, as alleged in the declaration, though the court admitted that it would be recoverable within the general clause, "other perils and misfortunes" under a count specially describing the cause of loss. (m) ² The court distinguished this case from that of *Fletcher v. Inglis*, on the ground that *there* the ship was, and here she was not, in the *ordinary course* of the voyage when the loss took place.

It will be observed that in this case of *Phillips v. Barber* the ship was not *water-borne* at the time of loss, but was in dock for repairs. It is on this principle that the two following cases seem to have proceeded, in both of which the ship, *at the time of the casualty, was under repairs, and, though *water-reached* was not *water-borne*.

(l) *Fletcher v. Inglis*, 2 B. & Ald. 315. (m) *Phillips v. Barber*, 5 B. & Ald. 161.

¹ See *Potter v. Suffolk Ins. Co.* 2 Sumner, 197. To constitute a stranding, within the policy, the vessel must be on the strand, under extraordinary circumstances. *Potter v. Suffolk Ins. Co.* 2 Sumner, 197.

² See *Ellery v. New Eng. Ins. Co.* 8 Pick. 14.

A ship was being hove down for repairs, but while heaving down, it was found she could not bear the strain on which she was then hauled up on the beach, where she bilged. Lord Ellenborough held this not to be a loss by the perils of the seas. (*n*)

A ship, insured by a time policy, was, within the period of the risk, hove down on a beach to be cleaned, *within the tide-way*; the tide, when it rose, knocked away the shores which supported the ship, in consequence of which she fell over and damaged her side planking. Ch. J. Mansfield held that this loss, though caused by the tide, yet, as it happened on land and when the ship was not water-borne, was not, as alleged in the declaration, a loss by the perils of the seas; and on this ground he nonsuited the plaintiff. (*o*)¹

Loss by the perils of the seas.

tide's knocking away the shores she is propped with.

Thompson v. Whitmore, 3 Taunt. 227.

§ 298. In order to sustain by evidence the allegation that the loss was by perils of the seas, it must be shown that those perils were the *proximate cause* of the loss.

Hence, where a ship, insured "against capture only," was driven by stress of weather on the enemy's coast, and there, without having received *any material damage* by the stranding, was captured by the enemy, this was held to be a loss, not by the perils of the sea, but by capture, and therefore recoverable under the policy. (*p*)²

So, where ship and goods, "warranted free from American condemnation," were *damaged* by the perils of the seas, and thereby driven ashore in such a position as to be afterwards seized and condemned by the American government, Lord Ellenborough held, that such subsequent total loss by

To support an allegation that the loss was by the perils of the seas, such perils must be shown to be the proximate cause of loss.

Ship stranded on enemy's coast, and there captured, held a loss by capture.

Green v. Elmslie, Peake, N. Pr. 212.

In such cases the subsequent total loss by capture takes away the right to recover for the previous average loss caused by the stranding.

Livie v. Jansen, 12 East, 648.

(*n*) Rowcroft v. Dunmore, cited 3 212. "Had the ship been driven on any other coast but that of an enemy," said Taunt. 227.

(*o*) Thompson v. Whitmore, 3 Taunt. 227. Lord Kenyon, "she would have been in perfect safety."

(*p*) Green v. Elmslie, Peake, N. Pr.

¹ But see Ellery v. New Eng. Ins. Co. 8 Pick. 14.

² So in a case of capture, if, before the vessel is delivered from that peril, she is lost by fire, or accident, or negligence of the captors, the whole loss is attributable to the capture, for the subsequent loss was incidental, and a consequence of the capture. Magoun v. N. Eng. Mar. Ins. Co. 1 Story, C. C. 157; Per Kent, Chief Justice, in Schieffelin v. N. York Ins. Co. 9 John. 21. But see Law v. Goddard, 12 Mass. 112.

Loss by the
perils of the
seas.

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Where, however, the loss by the stranding is in itself total, it may be recovered under a declaration alleging it to be by the perils of the seas, though followed by subsequent capture and condemnation. *Hahn v. Corbett*, 2 Bingh. 265.

seizure and condemnation, took away from the assured the right to recover in respect to the previous partial loss by the perils of *the seas*; for though by those perils the progress of the voyage had been stopped, and the ship brought within the reach and effect of the capture and condemnation, which she might otherwise have escaped, yet the substantive total loss by the capture and condemnation was imputable to the *latter peril only*, and not to the previous sea-damage. (q)¹

In this case the judgment of the court is throughout based on the assumption that the damage done to the ship and goods by the stranding was only an average loss, and as such was merged in the subsequent total loss by capture.

On the other hand, where the loss by the stranding is *itself total*, it may be recovered as a loss by the perils of the seas, though followed by consequent capture and condemnation.

Thus, where in an insurance on goods, "warranted free from capture and seizure," on a voyage "from London to Maracaybo," the ship, when within a few miles of Maracaybo, was driven on a sand bank and *totally disabled*, and while in that situation the goods, *which would otherwise have been entirely destroyed by the sea*, were seized as prize by the Spanish royalists, who had shortly before taken possession of the town and port of Maracaybo, Chief J. Best, and the rest of the Court of Common Pleas, held that this was rightly described in the declaration as a loss by the "*perils of the seas*;" for the perils of the seas were here the main concurring cause of loss; the ship having been by their agency reduced to a total wreck, while the goods must have been, by the same agency, wholly destroyed, had not the enemy appropriated them. (r)

(q) *Livie v. Jansen*, 12 East, 648.

United States. See Kent's Comm. vol.

(r) *Hahn v. Corbett*, 2 Bingh. 265. The principle of this case is adopted in the

iii. p. 302, note (a), ed. 1844.

¹ See *Rice v. Homer*, 12 Mass. 230. Where a ship insured only against *sea-risk* while in port, was driven ashore and stranded by a storm, being in port, and was burnt while stranded, and a jury found the loss to have occurred by *sea-risk*, the court did not think it a case for setting aside their verdict. *Patrick v. Com. Ins. Co.* 11 John. 9. But under a like policy on the cargo of the same ship, which was burnt in the ship, the court held, that as the cargo was not injured by the stranding, the loss of it must be attributed to the burning, which was a peril not insured against. *Patrick v. Com. Ins. Co.* 11 John. 14.

Upon the same principle that *causa proxima non remota spectatur*, it has been held that the loss on goods sold to defray the expenses of repairing a disabled ship in a port of distress, is not recoverable as a loss by *perils of the seas* (s);¹ *and on similar grounds it has also been decided in this country, that the loss caused by having to pay to another ship, in pursuance of the award of an arbitrator abroad half the damages done by a collision in which neither party was in fault, is not a loss by perils of the seas. (t).

If the perils of the sea have been the *proximate cause of loss*, the assured will not, as we have seen, be precluded from recovering under a count for loss by the perils of the seas merely because the negligence, unskilfulness, or misconduct of the master and mariners have been the remote occasion of such loss. (u)

Even where the loss is remotely occasioned by barratry, still, if it be proximately caused by the perils of the seas, it will be recoverable under a count alleging it to be so caused: thus, Lord Ellenborough held that, supposing the facts to have proved that the captain, having wilfully sailed in a foul wind, afterwards barratrously cut the ship's cable and let her drift on the rocks, whereby she was lost, this would have entitled the assured to recover under a count alleging a loss by the *perils of the seas*. (v)²

Of course, in order to enable the plaintiff to recover under such a count, the proximate cause of loss must appear to have been a peril of the sea; he cannot under such count recover for a loss *merely and wholly barratrous*, as for a fraudulent sale or the like.

The true rule is, that where the immediate and proximate cause of loss is the sea acting on the ship, the assured may recover under a count for loss by perils of the seas, notwith-

Loss by the perils of the seas.

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Loss on goods sold to defray expenses of repairing sea damage to the ship, is not loss by perils of the seas.

Nor, *semble*, sums paid under an award, as compensation for damage caused by collision.

Loss remotely occasioned by barratry, but proximately caused by the *perils of the seas*, is recoverable under the latter head of loss. Heyman v. Parish, 2 Campb. 149.

Aliter, if the barratry have been not only the remote occasion, but the direct conducting cause of the loss. Everth v. Hannam, 6 Taunt. 375.

(s) Powell v. Gudgeon, 5 Maule & Sel. 431. S. P. Sarqay v. Hobson, 4 Bingham 131.

(t) De Vaux v. Salvador, 4 Ad. & Ell. 420. See *contra* in the United States, † Peters v. Warren Ins. Comp. 3 Sumner's Rep. 389. { S. C. 14 Peters, 99. }

3 Kent's Comm. (5th ed.) 302 note (d). { Hale v. Washington Ins. Co. 2 Story C. C. 176, cited *post*, 805, and *ante*, 768. }

(*) See all the authorities collected in the last chapter, Sect. VI.

(v) Heyman v. Parish, 2 Camp. 149.

¹ See Giles v. Eagle Ins. Co. 2 Metcalf, 140, cited *post*, 910, note.

² See Waters v. Merchants Louisville Ins. Co. 11 Peters, (S. C.) 219, 220.

Loss by the perils of the seas.

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Loss by shipping seas, &c. caused by a merchantman being taken in tow by a man-of-war, and forced to carry a press of sail, is loss by perils of the seas. *Hagedorn v. Whitmore*, 1 Stark. 157.

standing previous barratry, which may have led to the loss, *i. e.* without which it would not have happened. (*w*)

*Where a ship was, by mistake, taken in tow by a British man-of-war, and was obliged, in order to keep up with her, to carry a press of sail in a gale of wind and a heavy sea, by which she shipped a quantity of water and damaged her cargo, Lord Ellenborough held this to be a loss by perils of the sea; though it might also have been alleged to be by arrest or detention. (*x*)

Damage occasioned to mast, spars, sails, or rigging, by carrying a press of canvas to escape an enemy or lee shore, would, no doubt, be recoverable, as a loss by perils of the seas. (*y*)

But the words, "perils of the seas," do not comprise all casualties happening to ship or goods at sea.

§ 299. But the words, perils of the seas, only extend to cover losses really caused by sea damage or the violence of the elements "*ex marinæ tempestatis discrimine*;" they do not embrace all losses happening upon the seas, which are comprehended under the general sweeping words at the end of the clause enumerating the risks insured against, *viz.* "all other perils, losses, or misfortunes which had or should come to the hurt, detriment, or damage of the said goods and merchandizes, ship, or any part thereof."

Thus, loss caused by being fired into at sea, is not recoverable as loss by perils of the seas. *Cullen v. Butler*, 5 M. & Sel. 461.

Thus, damage sustained by a ship from the fire of another vessel of the same nation, mistaking her for an enemy, is not, it seems, recoverable as caused by a *peril of the seas*; (*z*); and the damage caused to a merchantman by the fire of the enemy in defending her against attempted capture, would, it is apprehended, stand on the same ground (*a*), though both, as we shall presently see, are included in the general words, and would be recoverable under a count correctly specifying the cause of loss.

When loss on live stock is recoverable as loss by perils of the seas, and when it merely comes under the head of *mortality*.

§ 300. It is sometimes, as we have seen, in the case of

(*w*) See the observations of Chief J. Gibbs in *Everth v. Hannam*, 2 Marsh. Rep. 74. S. C. in 6 Taunt. 375, and the decision of the Court of Exchequer since the new rules, in *Blyth v. Shepherd*, 9 Mees. & Wels. 763.

(*x*) *Hagedorn v. Whitmore*, 1 Stark. 157.

(*y*) *Covington v. Roberts*, 2 Bos. & Pull. N. R. 378.

(*z*) *Cullen v. Butler*, 5 Maule & Sel. 461.

(*a*) *Taylor v. Curtis*, 6 Taunt. 608. 2 Marsh. Rep. 309.

insurances on *live stock*, a very nice question to draw the line *between loss caused by their mortality (*i. e.* natural death) and by the perils of the seas.

Loss by the perils of the seas.

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It should seem that if any number of living animals be deliberately thrown overboard to save the rest, in consequence of a scarcity of provisions occasioned by the gross ignorance of the captain in mistaking his course, and thus protracting the voyage; this will not be properly described as a loss by the perils of the sea. (b)¹

Gregson v. Gilbert, 3 Dougl. 232.

So, if they were to perish for want of food, owing to the unavoidable prolongation of the voyage, in consequence of bad and stormy weather, without fault of the captain and crew; this would be a loss by mortality, and not by perils of the sea. (c)

Tatham v. Hodgson, 6 T. Rep. 656;

On the other hand, when a cargo of live stock was so bruised and lacerated by the violent rolling and pitching of the ship in a storm, that they died shortly afterwards *on board*, in consequence of the injuries thus received; this was held to be a loss by *perils of the seas* (d), and the court came to the same conclusion where several horses, having in consequence of the laboring of the vessel in a violent storm, broken down the slings that supported, and the partitions that separated them, kicked each other so severely that they died in the course of the storm of the injuries thus received. (e)

Lawrence v. Aberdein, 5 B. & Ald. 107.

Gabay v. Lloyd, 3 B. & Cr. 793.

Where, however, the loss is one which is not *proximately* caused by the agency of the winds and waves, and either falls within the ordinary wear and tear of the voyage, or might have been prevented by a proper exertion of care and prudence, it is not recoverable as a peril of the seas, *nor indeed under the policy at all*.

Where the bottom of a ship is *destroyed by worms*, this is not a loss for which the underwriters are liable as a loss by the perils of the seas, at all events where the ship is

Damage to the hull by *worms* is generally wear and tear, and not a loss by perils of the seas.

(b) Gregson v. Gilbert, 3 Dougl. 232. Marshall on Ins. 493.

(d) Lawrence v. Aberdein, 5 B. & Ald. 107.

(c) Tatham v. Hodgson, 6 T. Rep. 656., and per Lord Tenterden, 5 B. & Ald. 111.

(e) Gabay v. Lloyd, 3 B. & Cr. 793. S. C. 5 Dowl. & Ry. 641.

¹ See Bramier v. Clap, 5 Mass. 1, cited *ante*, 343, in note.

Loss by the
perils of the
seas.

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insured for a voyage in seas where worms *ordinarily* assail *the bottom of ships; for the loss in such cases comes within the usual wear and tear of the voyage. (*f*) Besides, the assured in such seas ought to take care and secure the ship by *copper sheathing* against this kind of damage: if, however, he has done so, it is suggested by Mr. Phillips, and apparently with much reason, that in cases where the copper sheathing is *torn off by the* violent action of the perils insured against, in consequence of which the ship's bottom is worm-eaten, the underwriters ought to be liable (*g*); unless, indeed, the loss of the sheathing might and ought to have been repaired before the ship became exposed to the action of the worms, in which case the negligence of the assured in not repairing would exempt the underwriter. (*h*)

Damage by
rats.

On the same ground, the damage done to the ship by *rats* eating holes in the ship's bottom, was held by Lord Ellenborough not to be within the perils insured against by the common form of policy. (*i*)¹

Loss by collision: different possible cases of collision: Lord Stowell's enumeration.

§ 301. LOSS BY COLLISION is, generally speaking, a loss by the perils of the sea.² Lord Stowell thus lays down the law of the Courts of Admiralty upon the subject of collision, as it affects the rights and *liabilities of owners and masters*.³

"There are four possibilities under which a loss of this sort may occur.

"1st. It may happen without blame being imputable to either party; as where a loss is occasioned by a storm, or by

(*f*) *Rohr v. Parr*, 1 Esp. 444. S. L. in United States, † *Martin v. Salem Ins. Comp.* 2 Mass. Rep. 429. † *Hazard v. New England Ins. Comp.* 8 Peters, (S. C.) Rep. 567.

(*g*) 1 Phillips on Ins. 639, approved by Chancellor Kent, 3 Comm. (5th ed.) 300, note (*a*).

(*h*) † *Hazard v. New England Ins. Comp.* 1 Sumner, 218, cited *ibid*.

(*i*) *Hunter v. Potts*, 4 Camp. 203. Chancellor Kent collects in a compendious form all the learning on this point in his 3 Comm. 301, note (*a*).

¹ *Ante*, 758, and cases in note. But see *Garrigues v. Cox*, 1 Binney, 592.

² *Hale v. Washington Insurance Co.* 2 Story, C. C. 126; *Peters v. Warren Ins. Co.* 1 Story, C. C. 463.

³ This subject will be found treated with much amplitude in *Abbott, Shipping*, Pt. III. ch. 1, tit. Collision, p. 228, et seq. (8th Amer. ed.) cases cited in notes; in 3 Kent, (5th ed.) 230, 231; and in *Angell on Carriers*, § 633, et seq.

any other *vis major* : in that case the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree.

Loss by the perils of the seas. — Collision.

"2ndly. A misfortune of this kind may arise *when both parties are to blame*, where there has been a want of due *diligence and skill on both sides; in such a case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both.

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"3dly. It may happen by the misconduct of the suffering party alone; and then the rule is, that the sufferer must bear his own burden.

"4thly. It may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other." (j)

Emerigon, after citing all the learning to be found on the subject in codes and text writers, makes precisely the same division; and lays down the following positions with regard to the *liability of the underwriters*, for losses caused by collision in the different cases just enumerated. (k)

Liability of the underwriter in these different cases.

1st. That where there is *no fault* on either side, but the collision is *purely fortuitous*, the loss is to be made good by the underwriters, as caused by a *peril of the sea*.

Where there is no fault on either side, the damage caused by the collision is a loss by the perils of the sea, at the risk of the underwriters.

To the same effect, in our own law, it was decided by Lord Kenyon, that damage caused by one ship running foul of another by misfortune and without fault on either side, was a loss "*by perils of the seas*," within the exception of such losses in a charter-party. (l)

2ndly. Emerigon lays it down, that the underwriter is also liable when the *fault rests entirely with* the master and crew of the *other vessel*.

So it is where the fault rests entirely with the master and crew of the other vessel. *Smith v. Scott*, 4 Taunt. 125.

Our law is in this point also the same: thus, where the loss was occasioned by another ship running down the ship insured, owing to the very gross negligence of the crew of the other vessel (who had only one man on deck, and he asleep); this was held a loss by perils of the seas, for which

(j) In the *Woodrop*, Sims, 2 Dod. Ad. Rep. 65.

(k) Emerigon, chap. xii. sect. 14, vol. i. p. 416. ed. 1827. The Code de Com-

merce (art. 407.) has incorporated these distinctions into the text of the modern French law.

(l) *Buller v. Fisher*, 3 Esp. 67.

Loss by the perils of the seas. — Collision.

the underwriters were liable under a count so charging it. (m) ¹

3dly. Emerigon states that the underwriter is not liable when the collision is entirely owing to the master and crew of the insured ship.

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*There has been no direct decision in our courts upon this point. Mr. Marshall conceives that, in such case the wilful misconduct of the captain or crew would amount to barratry, and the loss, therefore, be recoverable under that head. (n)

If, however, it did not amount to barratry, the negligence would, it seems, be of so gross a description as to exempt the underwriters, on that ground, from their liability. (o) ²

When it is impossible to ascertain on which side the fault lies, and the whole amount of damage is therefore apportioned equally between the two ships, query whether the sum assessed under the apportionment is recoverable against the underwriter on ship, as a loss by the perils of the seas.

Emerigon then proceeds to lay down, 4thly, That in cases in which it is impossible to ascertain where the fault really lies, and the whole amount of damage is therefore apportioned equally between the two ships (*judicio rusticorum*, according to the rule of our Court of Admiralty,) then the sum which the insured ship has to pay is a particular average loss, to be made good by the underwriter. (p)

Boulay-Paty supports this opinion, on the ground that as the law has declared it impossible to decide which of the two ships was in fault, it is not to be presumed that either was ; but the loss must be regarded as a *direct result of the perils of the sea*, — i. e. of the violent action of the winds and waves, which drove the two ships against one another. (q)

Valin assumes that the underwriter would in such case be

Opinions of foreign jurists.

(m) Smith v Scott, 4 Taunt. 125.

(n) Marshall on Ins. 495.

(o) See as to this, 1 Phillips on Ins. 636.

(p) Emerigon, chap. xii. sect. 14, vol. i. p. 417. ed. 1827.

(q) Boulay-Paty, Comment. on Emerigon, vol. i. p. 418, and also Cours de Droit Com. Mar. tom. iv. p. 7. ed. 1823.

¹ So also where the collision was caused by the negligence of the mate and crew of the ship insured. *Hale v. Washington Ins. Co.* 2 Story, C. C. 176, 184, cited below, and *ante*, 768, in notes.

² But in *Hale v. Washington Ins. Co.* 2 Story, C. C. 176, The Ship Columbia, through the negligence or fault of her mate and crew, came into collision with the barque Ritchie, by which both vessels sustained damage ; the master of the Columbia, in behalf of his owners, paid to the owners of the Ritchie a certain sum, by way of compromise for the damage sustained by the latter vessel ; the underwriters on the Columbia were held liable for the sum so paid, as well as the damages, for the repairs and losses by the collision, to the Columbia. See this case cited *ante*, 768, in note ; *Peters v. Warren Ins. Co.* 1 Story, C. C. 463, cited *post*, 866, note.

liable, but does not particularly examine the question (*r*) ; neither does Pothier (*s*) ; but Mons. Estrangin, the learned editor of Pothier, investigates it very ably, and concludes " that the damage in such case ought to be regarded as a direct result of a peril of the sea, for which the underwriters on both ships would be liable." (*t*)

Loss by the
perils of the
seas. — Col-
lision.

In this country, as we have seen, the damage so assessed is held not to be recoverable as a loss by the perils of the seas, on the ground that it is not proximately caused by those *perils. (*u*) On the other hand, as we have also had occasion to observe, this doctrine of the English court has been examined and pointedly disclaimed by Mr. J. Story, founding himself upon the current of the foreign authorities, and upon the principle that any expense, or contribution, or loss, attached by the law maritime as an invariable consequence of a particular peril, may be considered, for the purposes of insurance law, as proximately caused by that peril. (*v*)¹

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SECT. II. *Loss by Fire.*

§ 302. Loss by fire, when caused by *lightning*, or the *enemy*, is clearly a charge upon the underwriter, under the word " Fire," in our common form of policy. (*w*)

Loss by fire.

Accidental fire
is a peril in-
sured against.

So, if the ship be burnt *under justifiable circumstances*, as to prevent capture (*x*), or from an apprehension of contagious disease (*y*), the underwriter is liable.

So, where ship
is burnt to pre-
vent hostile
capture, &c.

(*r*) Valin, tit. des Avaries, art. 11, tom. ii. pp. 476, 494. ed. de M. Becan , A. D. 1829. J. Story as given in 2 Phillips on Ins. 181 - 190.

(*s*) Pothier, Traite d'Assurances, No. 50. p. 72. ed. 1810. (*w*) Emerigon, chap. xii. sect. 17. vol. i. p. 428. ed. 1827, as usual, cites all the authorities.

(*t*) Pothier par Estrangin, p. 75. ed. 1810. (*x*) Gordon v. Remington, 1 Camp. 123. Emerigon accords, and cites Valin and Pothier to the same effect, provided the crew make their escape. Emerigon, chap. xii. sect. 17. vol. i. pp. 431 - 433.

(*u*) De Vaux v. Salvador, 4 Ad. & Ell. 420. (*y*) Emerigon, ibid. p. 429.

(*v*) † Peters v. Warren Ins. Comp. 3 Sumner, 359. See 3 Kent's Comm. (5th ed.) 302, and see the judgment of Mr.

¹ The same doctrine was entertained by the Supreme Court of the United States, upon the hearing of Peters v. Warren Ins. Co. on a writ of error. 14 Peters, (S. C.) 99. See Peters v. Warren Ins. Co. 1 Story, C. C. 463, 472; Hale v. Washington Ins. Co. 2 Story, C. C. 184, 185; ante, 766, 767, 805.

Loss by fire.

Underwriters on goods are not liable for their spontaneous combustion.

Seemingly, underwriters on ship would.

Fire occasioned by the negligence of the master and crew is a peril insured against.

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If the fire be occasioned by the damaged state of the goods, the underwriters on those goods are not liable; but if the loss be not so occasioned, the policy is not avoided by the underwriters not having been informed of the state of the goods. (z)

But the underwriters on the *ship* would, it seems, be liable for loss by fire occasioned to the ship by this cause.

It was for a long time a vexed question whether the underwriters, under a policy in the common form, were liable for a loss proximately caused by fire, but remotely occasioned by the negligence of the master and crew or other agents of the assured. This question in our law is now, as we have already seen, decidedly settled in the affirmative, supposing the master and crew to have been originally competent. (a) And, after some fluctuation in the decisions, the law in the United States seems now to be settled in the same way. (b)

Of course, where the form of the policy, as is very general on the continent, excludes the risk of the *negligence* of the master and crew, or, as in some of the French policies, the *barratry* of the master, (which word *barratry*, as there understood, extends not only to the *wilful* and *fraudulent*, but also to the *negligent*, acts of the master,) loss by fire so occasioned is not chargeable on the underwriters. (c)

Loss on rigging, &c., accidentally burnt on a bank saul, where it is generally stowed in the Canton river, by the usage

(z) *Boyd v. Dubois*, 3 Camp. 133. See *Emerigon*, vol. i. p. 430.

(a) *Busk v. Royal Exch. Comp.* 2 B. & Ald. 73. *Ante*, 768.

(b) By the cases of *† Patapasco Ins. Comp. v. Coulter*, 3 Peters, (S. C.) Rep. 222. *Columbia Ins. Comp. v. Laurence*, 10 *ibid.* 517. *Waters v. Merchants' Ins. Comp.* 11 *ibid.* 213. 3 Kent, (5th ed.) 303, 304, note (a). *Williams v. Suffolk Ins. Co.* 3 Sumner, 270, 276; *ante*, 768, note. In *Grim v. Phoenix Ins. Co.* 13 John. 451, it was held, after a searching and elaborate discussion, that a loss by fire arising from carelessness, was not covered by the insurance. But this decision preceded *Busk v. Royal Exch.*

Comp. and the other cases cited above in this note; and Mr. Chancellor Kent says, that "the rule appears to be settled by the weight of authority in the United States, that in a marine policy, in which fire is expressly insured against, the insurer is answerable for a loss by fire occasioned by the negligence of the master or crew." 3 Kent, (5th ed.) 304, in note.

(c) *Emerigon*, vol. i. pp. 428, 429, ed. 1827. The general subject of this section is well and succinctly discussed by Boulay-Paty, who however draws all his learning from the vast stores of *Emerigon*. See *Cours de Droit Com. Mar.* tom. iv. pp. 20-23.

of the Chinese trade, is a loss by fire under the common form of policy. (d)¹ Loss by fire.

A policy of insurance in the common form covers the risk of fire at sea in a *steamer*, just as in any other vessel. (e)²

SECT. III. *Loss by Hostile Capture and Belligerent Seizure, or "Takings at Sea."*

§ 303. Capture, properly so called, is a taking by the enemy as prize, in time of open war, or by way of reprisals with intent to deprive the owner of all dominion or right of property over the thing taken. (f)

The arrest, or carrying in for adjudication, of neutral ships *by belligerent cruisers, though not properly called capture (there being in this case no intent to deprive the owner of his property in the ship,) yet falls within the meaning of the words "*Takings at sea*," as one of the perils insured against; and the loss thence arising would be recoverable under a count alleging loss by capture.³

Capture is deemed *lawful* when made by a declared enemy, lawfully commissioned, and according to the laws of war; *unlawful* when it is made otherwise.

But its legality or illegality does not affect the liability of the underwriter as against the assured; whether lawful or unlawful, or however made, capture, when the proximate cause of loss, renders the underwriter liable under a policy alleging

Loss by hostile capture and belligerent seizure, or "takings at sea."

What capture properly is.

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What is lawful capture.

Its being lawful or unlawful does not affect the liability of the underwriter.

(d) *Pelly v. Royal Exch. Ass. Comp.* 1 Burr. 341. (f) *Emerigon*, chap. xii. sect. 18. *Prise*, vol. i. p. 432, et seq. ed. 1827, collects all

(e) *Pattison v. Mills*, 1 Dow. & Clark, 342. 2 Bish's N. S. 519. the learning on this point.

¹ "So it would unquestionably be," said Mr. Justice Putnam, in *Ellery v. New Eng. Ins. Co.* 8 Pick. 14, 20, 21, "if the ship should be for good reasons, put into a dry dock to be repaired, and be burnt. She would be as much at the risk of the underwriters as if she had been burnt upon the high seas."

² Under a river policy of insurance on a steamboat against the perils of the river, a loss occurred by the bursting of the boiler; and it was held, that the bursting of the boiler was within the perils of the river. *Citizens Ins. Co. v. Glasgow*, 9 Missouri, 411; *Perria v. Protection Ins. Co.* 11 Ohio, 147.

³ "It is not a strained interpretation of the term *seizure* to consider it synonymous with capture." *Black v. Marine Ins. Co.* 11 John. 287. Insurance against all the "risks, contained in all regular policies of insurance," covers capture. *Levy v. Merrill*, 4 Greenl. 180.

Loss by hostile capture and beligerent seizure, or "takings at sea."

Whenever capture is the proximate cause of loss, the assured may recover, as on a loss by capture.

Capture is, generally speaking, a constructive total loss.

The property is not changed by capture until condemnation.

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the loss to be "by capture," though other causes may have been contributory thereto. Thus, even where the capture was concerted between the master of the ship insured and the captor, Lord Ellenborough held that the assured might recover as on a loss by capture, though he might also have recovered on a count for barratry. (e) So where a ship was driven ashore, with only slight damage, on a hostile coast, and there captured, this was held to be a loss by capture, and not by perils of the seas. (f)

As we shall see more at large hereafter, in treating of abandonment, capture is *prima facie* a case of total loss, which gives the assured an immediate right to give notice of abandonment. If the underwriter accept this offer to abandon, the rights of the parties are fixed by such acceptance; but if not, the right of the assured to recover for a total loss depends upon the point whether the ship be restored before action brought;¹ if it be, then the assured will recover in proportion to the actual damage done; if not, then the whole sum insured. (g)

It was formerly a moot point when the property in a captured ship should be deemed to be completely divested out of its former owners; some publicists insisting that the property was divested by twenty-four hours' quiet possession (h); others contending that it was enough if the ship had once been carried *infra præsidia hostium*. (i)

It has long, however, been the established rule of our law maritime, that the property is not changed by capture in favor of a vendee or recaptor, so as to bar the original owner, till there has been a regular sentence of condemnation. (j)²

(e) *Archangelo v. Thompson*, 2 Camp. 620.

(f) *Green v. Elmslie*, Peake, N. Pr. 212. See also *S. P. Livie v. Jansen*, 12 East, 648.

(g) See *post*, Chapter on Abandonment and Total Loss.

(h) *Grotius*, lib. iii. c. 6. Valin, Com-

ment. on Ordonnance de la Mar. tit. ix. art. 8.

(i) *Bynkershoek*, *Quest. J. Pub. lib. i. cc. 4, 5*. See also *Marten's Summary*, lib. 8, c. 3, sect. 11.

(j) See *Marshall on Ins.* 803, where all the authorities are collected.

¹ The law is different in the United States. See *post*, 993 to 995, and notes.

² In note to *Abbott on Ship*. (6th Am. ed.) 26, 27, Mr. Justice Story says, that, "it is now the generally received doctrine in our courts, that a sentence of condemnation is

And the condemnation, in order to be legal, must be pronounced by a prize court of the government of the captor, sitting either in the country of the captor or of his ally. The prize court of an *ally* cannot condemn; nor can a prize court of the captor's lawfully act as such in a *neutral* territory (*k*): but the prize court of a captor sitting in the country of his own sovereign, or of an ally, has lawful jurisdiction over prizes carried into *neutral* ports, and remaining there at the time of passing sentence. (*l*)

Loss by hostile capture and belligerent seizure, or "takings at sea."

What is requisite to make condemnation valid.

But although the mode in which sentence of condemnation is made is all important, as regards the rights of the original owner against the neutral vendee or the recaptor, yet, as we have seen, it does not, in any way, affect the question of the liability of the underwriter.

Apart from all questions as to abandonment, which will be considered elsewhere, the underwriter is liable for any damage the ship may have actually sustained, and also for all necessary expenses, such as salvage, &c., which the assured has been put to for the recovery of his property.

The underwriter is liable for necessary expenses, of recovering captured ship, as salvage, &c.

(*k*) *The Flad Owen*, 1 Rob. Rep. 135. *Havelock v. Rookwood*, 8 T. Rep. 268. *Oddy v. Bovill*, 2 East, 475. Answer to the Prussian memorial of 1753, given in *Magna on Insurance*, vol. i. p. 453.

Schooner Sophie, 6 Rob. Ad. Rep. 138, *in notis*. { *Abbott on Ship*, (6th Amer. ed.) 26, 27. *Hudson v. Guestier*, 4 Cranch, 293. S. C. 6 Cranch, 281. *The Arabella and Madeira*, 2 Gallison, 368. }

(*l*) *Smart v. Wolf* 3 T. Rep. 263.

necessary to transfer property captured as prize, and originally belonging to neutrals; " and he cites, *Hudson v. Guestier*, 4 Cranch, 293; *Wheelwright v. De Peyster*, 1 John. 471; *Rose v. Himely*, 4 Cranch, 508. And if the sale be made by captors before condemnation, the title is affirmed by a sentence of condemnation subsequently passed, so as to make it good *ab initio*. *Williams v. Amroyd*, 2 Wash. C. C. 508; S. C. 7 Cranch, 423. The learned judge further says, — "How far a sentence of condemnation is necessary to change the title to property between enemies, has been a subject of much controversy, and upon which the courts of different countries have entertained different opinions. The ordinance of Congress of 1781, declared, that 'when any prize having been taken and possessed by the enemy twenty-four hours, shall be retaken from them, the whole of such recaptured prize shall be condemned for the use of the recaptors.' 7 Journals of Congress, 68, 295. This ordinance was held to apply to cases of property of one of the belligerents, and not to the case of neutral property. *Miller v. Ship Revolution*, 2 Dallas, 1. It fell, however, with the confederation. In the case of the *Mary Ford*, 3 Dallas, 188, the Supreme Court held, that captors acquired immediately on the capture of the property of their enemies such a right to it as no neutral nation could justly impugn or destroy, and that if the captured property were abandoned at sea, the right of the original owners was not thereby revived, so that upon a libel of salvage by neutrals in a neutral court, the residue, after the salvage, could be decreed to them; but it must be decreed to the captors." See *Glass v. The Betsey*, 3 Dallas, 6; *U. States v. Peters*, 3 Dallas, 121; *The Invincible*, 2 Gallison, 29; S. C. 1 Wheaton, 238.

Loss by hostile capture and belligerent seizure, or "takings at sea."

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So, for money paid by way of compromise, to prevent condemnation.

Former practice, as to ransoming British ships.

Thus, it has been determined that he is liable for a sum of *money paid by the neutral assured to belligerent captors, as a compromise made *bonâ fide* to prevent the ship from being condemned as prize. (m)

§ 304. Formerly it was a common practice to ransom British ships when captured by the enemy, by delivering to the captor what was called a *ransom bill*, which secured to him the price agreed upon, and operated as a bill of sale of the ship and cargo to the original owners, and as a protection to the ship against other cruisers of the enemy during the remainder of her voyage. A hostage was also delivered to the captor, to secure to him the punctual payment of the stipulated sum.

Nature of a ransom bill.

The *ransom bill*, independently of the hostage, was considered as a contract of the law of nations, and obligatory upon the owners, as well as upon the captain who signed it (n), and actions have been formerly brought upon such bills in our courts.

In case of insurance, the *amount of the ransom bill* was the measure of the demand which the assured had against the underwriters in respect of the capture. (o)

Actions on ransom bills declared illegal at common law.

The practice of ransoming of British ships declared illegal by the legislature.
22 G. 3. c. 25.

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At length, however, the courts of common law, proceeding on the principle that an alien enemy cannot sue for any right acquired in actual war, decided that no action could be maintained in our courts on a ransom bill (p); and shortly afterwards the legislature (in the year 1781) wholly abolished the practice, by declaring all ransom by British subjects of ships or goods taken by the enemy as prize to be illegal. (q)

*The act, in terms, declares it unlawful "*to ransom, or to enter into any contract or agreement for ransoming;*" and under these words it has been held that a redemption of his

(m) *Berens v. Rucker*, 1 W. Bl. 313. It is not stated how the loss was laid in the declaration.

(n) For the general law maritime as to ransom see Emerigon, chap. xii. sect. 21. pp. 463-480. For the modern law of France on the subject, see Code de Commerce, art. 395, 396. Estrangin on Pothier, Nos. 133, 136, 137. Boulay-Paty, Cours de Droit Com. Mar. tom. ii. p. 457, et seq. and tom. iv. p. 420, et seq.

(o) *Ricoord v. Bettenham*, 3 Burr.

1734. *Corner v. Blackburn*, Dougl. 641.

(p) *Anthon v. Fisher*, Dougl. 649.

(q) The first Ransom Act is the 22 Geo. 3, c. 25. This act, having no clause of limitation, is *perpetual*; the last prize Act (43 Geo. 3, c. 160,) in its 34th section, in re-enacting the prohibition against ransom, added the words "unless in cases of extreme necessity, to be allowed by the Court of Admiralty;" but this act expired with the end of the war, so that the prohibition now remains absolute.

ship by the owner from the captors after capture and illegal condemnation by the enemy's consul in a neutral port, is a ransom, and illegal; and that if insured he cannot recover from the underwriters the money paid for such redemption. (r)

Loss by hostile capture and beligerent seizure, or "takings at sea."

The grounds upon which the court went in this case were, that any redemption by money or other consideration of that which is taken in war, is a ransom under the act of parliament, whether it take place on sea or on shore; and that this was such a redemption, rather than a repurchase, because there had been no regular sentence of condemnation, so as to divest the property out of the owner.

It often happens that a re-captured ship is in a state to prosecute her original voyage, and, in that case, it is the interest of the re-captors, as well as of the other parties concerned, that she should be permitted to do so; provision, accordingly, was made for this case by the legislature by two acts, both of which expired with the termination of the last great maritime war. (s)

Ship empowered, after re-capture, to prosecute her original voyage.

We have seen elsewhere that the risk of British capture is not covered in policies effected during war time with British underwriters on enemy's property under the general words, "capture," "takings at sea," or the like (t); and even that the same rule applies where the policy has been effected before the commencement of hostilities (u), and the action not being brought till after their termination. (v)

Risk of British capture cannot be insured against by British underwriters.

"A policy," says Lord Ellenborough, "containing an insurance against British capture, *eo nomine*, would be illegal and void on the face of it; and an insurance producing indirectly the same effects, by the application afterwards of the general terms of the policy to the particular event of British capture which has since happened, must, on principle, be equally illegal." (w) And the general decision of the court was, that no peril, the subject of insurance, can be covered under the general terms "capture," "detention of

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(r) *Havelock v. Rockwood*, 8 T. Rep. 208: the declaration in this case alleged a loss "by capture." *Parsons v. Scott*, 2 Taunt. 363.

(s) 43 G. 3. c. 160. s. 41. (the Prize Act,) and 45 G. 3. c. 72.

(t) *Kellner v. Le Mesurier*, 4 East, 396. *Brandon v. Curling*, *ibid.* 410.

(u) *Furtado v. Rodgers*, 3 Bos. & Pull. 191.

(v) *Gamba v. Le Mesurier*, 4 East, 407. (w) 4 East, 402.

Loss by hostile capture and belligerent seizure, or "takings at sea."

Treaty stipulations as to restoration of prizes, made after peace concluded.

Seizure after preliminaries of peace signed, is not a *capture*, but an *arrest of princes*.

princes," or the like, which could not, consistently with law, be specifically insured against in direct and express terms.

As the hostilities of a general maritime war, which is carried on by public and private armed ships in so many different parts of the globe at once, cannot be supposed to come to an end immediately on the conclusion of peace, stipulations are generally inserted into most treaties specifying the periods, varying according to distance, within which all prizes made shall be restored. (x) If, however, it can be shown that the captor was, in fact, aware of the peace being proclaimed when he made the prize, such prize, though made before the expiration of the time limited in the treaty, shall be restored. (y) In this country it was determined, in the time of Lord Hardwicke, that where a ship was seized after a cessation of arms, and the signing of *preliminary articles of peace*, this was not to be deemed a *capture*, but only an arrest of princes. (z)

SECT. IV. *Loss by Arrests, Detentions, and Embargoes.*

Loss by arrests, detentions, and embargoes.

§ 305. By the terms of our common policies, the underwriter is answerable for all losses occasioned by *arrests, restraints, and detentions of all kings, princes, and people of what nation, condition, or quality, whatsoever*.¹

(x) Emerigon, chap. xii. sect. 19, vol. i. p. 452.

(z) Spencer v. Franco, Beawes, 316. 4th ed. cited by Lord Mansfield in Hamilton v. Mendes, 2 Burr. 1211.

(y) Emerigon, chap. xii. sect. 19, vol. i. p. 452.

¹ Under a policy of insurance of slaves, containing the clause in the text, it was held, that the underwriters would be liable for a loss sustained by the slaves being taken from the vessel and set at liberty on a writ of *habeas corpus*, issued by a judicial officer of a government, within the control of which the vessel was driven by stress of weather. *Simpson v. Charleston Fire and Marine Ins. Co.* Dudley, (S. C.) 239. This clause is sometimes restrained by the insertion of the word "*unlawful*" arrests, &c. See *McCall v. Marine Ins. Co.* 8 Cranch, 59; *Olivera v. Un. Ins. Co.* 3 Wheat. 183; *Thompson v. Read*, 12 Serg. & R. App. 440. Where a policy of insurance, as in the Boston policies, contained a clause, that the "insurers shall not be liable for any charge, damage, or loss, which may arise in consequence of seizure or detention for or on account of illicit or prohibited trade, or trade in articles contraband of war," Mr. Justice Story decided, that a seizure made *bond fide*, (however unfounded in fact,) upon reasonable grounds, would be a legal and justifiable cause of seizure and

By the word "people" is meant, not mobs or multitudes of men, but the *ruling power of the country*, whatever that may be. (a)

An "*arrest*" takes place whenever the government of the *country to which a ship belongs, or any other friendly power, with the object, not of *prize* (for then it would be a *capture*,) but with a design to restore the ship and goods, or pay the value of them to their owners, seizes the ship and goods for state purposes, either in port or at sea. (b)

Thus, where a Genoese corn ship was seized at sea by Venetian cruisers, and carried into the relief of Corfu, then in a state of famine, where it was sold and paid for, it was decided by the rota of Genoa that this was not a *capture*, in respect of which the assured, who had abandoned, could recover for a total loss, but merely an arrest, or detention of princes, the object being not to make prize, but to purchase corn. (c)

In this lies the grand distinction between *arrest* and *capture*. *Capture* is, as we have seen, the forcible taking of a ship, &c., in time of war, with a view to appropriating it as prize. *Arrest* is a temporary detention of ship, &c., with a view to ultimately releasing it, or repaying its value. (d)

Hence, the detention of ships in port after declaration of war against the country to which they belong, or by way of reprisals, rather resembles a capture than an arrest. (e)

So, where a neutral ship is arrested at sea by a belligerent cruiser, and under suspicion of having enemy's goods on board, is carried for search and adjudication into an hostile port; as the result may be the condemnation of ship and cargo, but more especially as the act is done in time of war,

Loss by arrests, detentions and embargoes.

Meaning of the word "people" in the common clause.

What an arrest is, as distinct from a capture.

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Seizure of corn-ship by friendly cruisers to supply a famished port is an "arrest."

Detention of ships in port after declaration of war, and carrying in neutral ships for adjudication, rather resembles capture than arrest.

(a) *Nesbitt v. Lushington*, 4 T. Rep. 753.

(b) The definition of Boulay-Paty seems concise and accurate: "L'arrêt de prince est l'acte d'un prince ami, qui pour nécessité publique, et hors le fait de la guerre, arrête quelque vaisseau ou tous les vaisseaux qui se trouvent dans un port ou rade

de ses dominions." *Cours de Droit Com. Mar.* tom. iv. p. 36.

(c) *Roccus*, not. 60, cited by Emerigon, chap. xii. sect. 30, vol. i. p. 527, ed. 1827.

(d) Emerigon, chap. xii. sect. 30, vol. i. p. 527, ed. 1827.

(e) *Ibid.* and see *Marsh. Ins.* 509.

detention, within the purview of the clause. *Bradstreet v. Neptune Ins. Co.* 3 Sumner, 600; *Carrington v. Merchants Ins. Co.* 8 Peters, (S. C.) 426, 516, 517; *Magoun v. N. Eng. Marine Ins. Co.* 1 Story, C. C. 157; *post*, 871, in note.

Loss by arrests, detentions, and embargoes.

Of embargoes: what an embargo is.

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An embargo laid by a foreign government on the property of any other than its own subjects is a peril insured against, and gives the assured an immediate right of abandonment. *Rotch v. Edie*, 6 T. Rep. 413.

Aliter, where the assured is himself a subject of the foreign government.

and as a warlike measure, this is rather to be esteemed a *capture* than a simple arrest, and accordingly is, *prima facie*, a ground of abandonment. (f)¹

Embargoes are the most common cases of "*arrests, restraints, and detentions*" of princes.² An *embargo* is an *order of government (generally, but not always, issued in contemplation of hostilities) prohibiting the departure of ships or goods from some or all of the ports within its dominions. (e)

An embargo laid by a foreign government upon the ships or goods of any other than its own subjects, entitles the assured at once to give notice of abandonment, and, if the embargo continues down to the time of action brought,³ to recover as for a total loss. Thus, where a neutral ship and stores were insured "*at and from*" an enemy's port, and there detained, before sailing, by an embargo laid on by the enemy, in the port of loading, and continuing down to the time of action brought, it was held that the assured might recover as for a total loss, in our courts, in respect of the ship and stores of which he had been so deprived under a count alleging the loss to be by "*arrest and restraint of princes.*" (f)

But where, as we have already seen, the embargo is laid on by a foreign government, of which the assured is the subject, the law in England appears to be, that the foreign assured cannot abandon and recover as for a total loss, in respect of such embargo, in our courts; at all events unless it manifestly appears, either from the policy itself or from the whole facts of the case, that such embargo was a risk distinctly contemplated by the parties to the policy. (g)

(f) *Barker v. Blakes*, 9 East, 283, and see *Marshall on Ins.* 510. *Emerigon*, chap. xii. sect. 30, vol. i. p. 527.

(e) *Emerigon*, chap. xii. sect. 30, vol. i. p. 526.

(f) *Rotch v. Edie*, 6 T. Rep. 413.

(g) *Conway v. Gray, &c.* 10 East, 536, as modified by *Simeon v. Bazett*, 2 Maule & Sel. 94, and *Bazett v. Meyer*, S. C. in error, 6 Taunt. 824; see also *Campbell v. Innes*, 4 B. & Ald. 423. See above, Chap. I. Sect. VII. < *Ante*, 773, 753, 784. >

¹ Where a vessel is detained by an epidemic prevailing at a port when she arrives, the damages consequent thereon may be recovered of the insurers. *Williams v. Smith*, 2 Caines, 1.

² See *Olivera v. Un. Ins. Co.* 3 Wheat. 183; *Odlin v. Ins. Co. of Penn.* 2 Wash. C. C. 312; *ante*, 768, and in note.

³ See *post*, 993 to 996.

There appears to be no doubt, that if a British ship be arrested or seized by the *British government*, from any state necessity, or detained in port by a British laid embargo, this is a loss for which the underwriters are liable as a detention, within the meaning of the policy. (*h*) Such, accordingly, seems to have been the opinion of our courts in a case where a British ship was seized by the British government and *converted into a *fire-ship* (*i*), and in another where such ship was seized and taken in tow by a British man-of-war: (*j*)

Loss by arrests, detentions, and embargoes.

Embargo or detention by the British government is a peril insured against in British policies.

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In fact there seems no ground of distinction in this respect, as far as concerns the liability of the underwriters between an arrest or embargo by the *home*, and by a *foreign* government: accordingly, the modern French code of commerce has decreed, that "arrest by the home government after the commencement of the voyage," is a ground of abandonment (*k*); and the later French jurists, especially Boulay-Paty (*l*) and Estrangin (*m*), show that it rests on precisely the same ground as an arrest by foreign powers.

Foreign law as to this point.

In French law the risk on the ship does not commence until she has *sailed* on the voyage, and accordingly the language of the code is, that abandonment may be made on account of an arrest by the home government *after*, but not *before the commencement of the voyage*. (*n*)

In our law under policies "*at and from*" a port, the risk on the ship commences while she is at the port undergoing repairs, or otherwise preparing for the voyage insured; and there seems no doubt that if a ship thus insured were arrested or detained by our government in her port of loading, with her cargo on board, but before she had broken ground for the voyage, the underwriter would be liable as for a loss by arrest, or detention under such a policy. (*o*)

A question has been raised, whether, in case goods are seized by a friendly power, or by the home government for

(*h*) Dictum of Lord Alvanley in *Toussang v. Hubbard*, 3 Bos. & Pull. 302.

(*i*) *Green v. Young*, 2 Lord Raym. 840. Salk. 444.

(*j*) *Hagedorn v. Whitmore*, 4 Stark. 157.

(*k*) Art. 369, 370.

(*l*) Boulay-Paty, Cours de Droit Com. Mar. tom. iv. pp. 36-44, and 237-240.

(*m*) Estrangin on Pothier, No. 59, pp. 94, 95, ed. 1810.

(*n*) Code de Comm. art. 369, 370. See, however, Emerigon, chap. xii. sect. 30, vol. i. p. 528, ed. 1827. "C'est à dire, avant que le tems des risques ait aura pour les assureurs sur le corps." See also Pothier, Traité d'Assurance, No. 59.

(*o*) *Green v. Young*, Salk. 444. Rotsh v. Edie, 6 T. Rep. 413.

Loss by arrest, detentions, and embargoes.

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Wages and provisions during detention by embargo, are not in this country a charge on the underwriter : reason of this.

state necessities, as in the case of provisions already mentioned, the assured can recover as for a loss *by arrest and detention* ; the better opinion seems to be, that if a price be *paid for the goods equivalent to their value for the purposes of insurance, (i. e. their prime cost, together with the expenses of insuring, and loading them on board,) the assured can claim nothing ; if less than this he may sue for the difference ; if no payment be made he may recover as for a total loss. (p)

An arrest, detention, or embargo, does not, like a capture, break up the voyage under the charter-party, or at once put an end to a contract of affreightment ; on the contrary, the voyage is still supposed to be proceeding on its former terms ; the period of detention being considered as a portion of it.

Hence it is that the wages and provisions of the crew during a detention by embargo, are not chargeable, by our law, upon the underwriter on ship, they being supposed to form one of those ordinary and usual expenses of the navigation which fall exclusively upon the shipowner, and for which he is remunerated out of the freight. (q)¹

The principle here is, that the shipowner, *in consideration of the freight, owes the services of the crew to the freighter during the whole voyage*, and consequently also during the time of detention, which is considered to make part thereof. (r)

French law as to this point.

In France the Code de Commerce provides that the wages and provisions of the sailors during a detention of princes shall be particular average, when the ship is chartered for the entire voyage (s) ; general average when the ship is hired at so much per month. (t) The reason being, that as in the latter case the owner receives no freight for the time during which the ship is detained, he does not owe the services of his crew during such time to the freighters, and his providing

(p) Valin, Comment. sur l'Ordonnance, tit. des Assurances, art. 49. Pothier, No. 57, as cited and commented upon with various other authorities by Emerigon, chap. xii. sect. 33. vol. i. pp. 543-545. ed. 1827.

(g) Eden v. Poole, Park, 91. 7th ed. Marshall on Ins. 730. Robertson v. Ewer,

1 T. Rep. 127. Sharp v. Gladstone, 7 East, 32. *in nota*.

(r) Benecké, Pr. of Indem. 462. Pothier, Traité des Charte Parties, No. 85, cited by Emerigon, chap. xii. sect. 30. vol. i. p. 529.

(s) Art. 403. § 4.

(t) Art. 400. § 6.

¹ See post, 849, 850, and notes.

such services is, therefore, an extraordinary expenditure for the general benefit.

Loss by arrests, detentions, and embargoes.

* SECT. V. *Loss by Pirates, Rovers, and Thieves.*

* 817

§ 306. Amongst the perils which the underwriters avowedly take upon themselves in our common printed forms of policy, are those of "pirates, rovers, and thieves."

Loss by pirates, rovers, and thieves.

1. *Of pirates and rovers.*

Loss thus incurred was formerly included in our maritime law amongst the general *perils of the seas* (u), and probably would still be held to be so; though, as piracy is one of the enumerated perils, the point is of less importance.

Where a meal mob on the coast of Ireland violently boarded a corn laden ship that had been forced to put into Elly harbor, took the government of her from the captain and crew, ran her on a reef of rocks, whereby the cargo was damaged, and then forced the captain to sell the corn at a low price: Lord Kenyon held that this was a *loss by pirates*, and consequently that the assured might have recovered under a count so alleging it, had not the underwriters been exempted by the memorandum from all average loss on the corn. (v)

Loss on goods by a mob boarding the ship, is a loss by *pirates*. Nesbitt v. Lushington, 4 T. Rep. 783.

Under the risk of pirates and rovers, the underwriters are, it seems, liable for a mutinous seizure and carrying away of the ship by the crew. (w)

2. *Thieves.*

The theft that is insured against by name in the policy, means that which is accompanied by violence (*latrocinium*), and not simple theft (*furtum*); it being an old and elementary rule of the law of insurance, that *furtum non est casus fortuitus*, is not one of the fortuitous events, for the occurrence of which the owner may seek indemnity by insurance, but *one of those cases which the law presumes the master might

Simple theft, unaccompanied by violence (*furtum*), is not a peril insured against. But falls on the owner or master.

* 818

(u) 2 Roll. Abr. 248. pl. 10. Cumberbatch, 58, cited by Park on Ins. 137. 8th ed. The foreign law is to the same effect. *Santerna de Aspec.* part iii. n. 61-65. *Straccha*, Gloss. 22, cited by Chancellor Kent, Comm. vol. iii. p. 302. note (d), ed. 1844.

(v) *Nesbitt v. Lushington*, 4 T. Rep. 783.

(w) *Brown v. Smith*, 1 Dow's Parl. Cases, 349. In *Dixon v. Reid*, 5 B. & Ald. 597, such loss was laid as loss by *baratry*, which seems the true mode of alleging it.

Loss by pirates, rovers, and thieves.

Robbery (*latrocinium*), when committed by strangers, is a peril insured against.

Held in the United States that theft, though committed by the crew, is a peril insured against.

This doctrine opposed by Chancellor Kent.

Plunder of goods by wreckers, is a peril insured against.

Clause in Boston policies.

have prevented by the exercise of due vigilance, and the loss arising from which he consequently ought to bear. (v)

Robbery, accompanied by violence, and committed by strangers, not by the crew, is a loss for which the underwriters on the ship or goods are liable as a loss by rovers or thieves under the policy, the maxim being, that *latrocinium fatale damnum, seu casus fortuitus est.* (w)

It has, however, recently been decided by Chancellor Walworth, in the state of New York, that, under the general word "thieves," in the common form of policy, the assured on ship or goods may recover even for a simple theft committed on the voyage by persons belonging to the ship (x): Chancellor Kent, however, in a note, rich with his usual variety of learning and pregnant accuracy of expression, shows that this doctrine not only overrules all the old authorities and text books, but is of very questionable policy when applied to the owner of the ship (y): in this country it cannot be considered law.

If shipwrecked goods are plundered by wreckers on shore, this was held by Emerigon and Pothier, and has been decided in this country, to be a loss for which the assured on goods may recover under a count for loss by perils of the sea. (z)

In order to obviate all doubt as to the construction of the word "thieves" in the policy, the printed forms of the Boston policy, instead of "pirates, rovers, and thieves," contain the words, "pirates and assailing thieves." (a) ¹

(v) See all the learning on this subject collected and lucidly arranged by Emerigon, chap. xii. sect. 29. *vol des effets assurés*, vol. i. p. 524. ed. 1827.

(w) *Roccus*, No. 43, cited by Emerigon, chap. xii. sect. 29. So held in English law, *Harford v. Maynard*, before Lord Mansfield, cited in *Park on Ins.* 36. 8th ed.

(x) † *Atlantic Ins. Comp. v. Storrow*, 5 Paige, 293. ‹ *American Ins. Co. v. Bryan*, 1 Hill, 25. S. C. 26 Wendell, 563. 3 Kent, (5th ed.) 303, in note. Mar-

shall v. Ins. Co. 1 Humphrey (Teen.) 99. In *Amer. Ins. Co. v. Bryan*, it is suggested that there is a difference between the terms of the English and American policies in reference to this point. }

(y) 3 Kent's Comm. (5th ed.) 303, note (a).

(z) Emerigon, chap. xii. sect. 29, citing Pothier, *Traité d'Assurance*, No. 55. *Bondrett v. Hentigg*, Holt's N. Pr. 149.

(a) Form of Boston policy, *Vaucher*, 44.

¹ See *Stone v. National Ins. Co.* 19 Pick. 34.

*SECT. VI. *Loss by Barratry.*

* 819

ART. 1. *What is Barratry in English Law.*

§ 307. "Barratry of master and mariners" being one of the perils insured against in our common printed forms of policy, the first question is as to the meaning attached to the word *Barratry* in English law. Guided by the etymology of the word, which seems ultimately to have been derived from the Catalan *barat* (*b*), and proximately from the Italian *barratria* (*c*), in both which languages it conveyed the notion of *fraud or trick*, our judges for a long time seem to have considered that fraud, or criminal knavery, on the part of the master *as against the owners, with a view to benefit himself at their expense*, was an essential ingredient in barratry as insured against in English policies. (*d*)

Loss by barratry.

Meaning of the word barratry in English law.

Lord Ellenborough, however, in an elaborate decision, in the course of which he reviewed all the preceding authorities, established the position that *trick or knavery in the sense of an imposition practised upon the owners by the master, with a view to promote his own benefit at their expense*, was not essential to constitute barratry in our law: but that any *wilful act of known criminality or gross malversation, even though not intended for the owner's prejudice*, nay, even though intended for their benefit, would yet, if in fact it *operated to their prejudice, by causing the loss or seizure of the ship, be barratry in the master. (*e*)

Trick or knavery practised by the master on the owners, with a view to promote his own benefit at their expense, is not essential to barratry.

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(*b*) Emerigon, chap. xii. sect. 3. vol. i. p. 365, ed. 1827.

(*c*) Per Lord Mansfield in *Vallejo v. Wheeler*, Cowp. 154.

(*d*) Thus, in the earliest English case on the subject, *Knight v. Cambridge*, 8 Mood. Rep. 231. (ed. 1769), as cited by Lord Ellenborough in 8 East, 135, the court considered *fraud* to be the substantial matter constituting barratry. So Chief J. Lee said, "To make barratry it must be something of a criminal nature." *Stamma v. Brown*, 1173. "Barratry," said Lord Mansfield, "must partake of something criminal, and must be commit-

ted against the owner by the master and mariners." *Nutt v. Bourdieu*, 1 T. Rep.

330. "Whatever is by the master a *cheat*, a *fraud*, a *cozening*, or a *trick*, is barratry." *Vallejo v. Wheeler*, Cowp. 154. "Barratry," says Mr. J. Aston, in the case last cited, "comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured." *Ibid*. 155. See also the dicta of Mr. J. Willes, in *Lockyer v. Offley*, 1 T. Rep. 232.

(*e*) *Earle v. Rowcroft*, 8 East, 126. *Heyman v. Parish*, 2 Camp. 149.

Loss by barratry.

Judgment of Lord Ellenborough in *Earle v. Rowcroft*.

His lordship, in the case now referred to, after stating that "a fraudulent breach of duty by the master in respect of his owners, or, in other words, *a breach of duty in respect of his owners with a criminal intention or ex maleficio is barratry*," lays it down that it is equally so "whether the act of the master be induced by motives of *advantage to himself, malice to the owners, or a disregard to those laws which it was his duty to obey, and which (or it would not be barratry) his owners relied upon his observing.*"¹

Adverting to the doctrine "that, if the conduct of the master, though criminal in respect of the state, were, in his opinion, likely to advance his owner's interest, and intended by him to do so, it would not be barratry."—Lord Ellenborough declared he could not assent to it; for that it was not for the master to judge in cases not entrusted to his discretion, or to suppose that he was not breaking the trust reposed in him, when endeavoring to advance the interests of his owners by means which the law forbids, and which his owners also must be taken to have forbidden, not only from what ought to be, and therefore must be presumed to have been, their sense of public duty, but also from a consideration of the risk and loss likely to ensue from the use of such means. (f)

Any gross malversation by the captain in his office, is barratrous, without fraud on the owners.

Upon a subsequent occasion, on its being argued before Lord Ellenborough that what would otherwise have been a clear case of barratry, was not so because there did not appear to have been *any fraud* on the owners, his lordship said, "*that is not necessary. It has been solemnly decided that a gross malversation by the captain in his office is barratrous.*" (g)²

(f) See Lord Ellenborough's judgment, *Earle v. Rowcroft*, 8 East, 139. 149, where the reporter refers to *Earle v. Rowcroft* as the decision alluded to.

(g) In *Heyman v. Parish*, 2 Camp.

¹ See *Crousillat v. Ball*, 4 Dallas, 294. There can be no barratry without fraud or crime. *Wiggin v. Amory*, 14 Mass. 1. So held in this case where there was a deviation by the master's stopping and recapturing and manning an American vessel, in the possession of the British as prize. See also *Walden v. Fireman's Ins. Co.* 12 John. 128.

² See *Stone v. National Ins. Co.* 19 Pick. 37, per Putnam, J. Barratry "may be committed against the owners of the cargo, as well as against the owners of the ship."

Barratry, then, in English law, may be said to comprehend *not only every species of fraud and knavery covinously committed *by the master with the intention of benefiting himself at the expense of his owners, but every wilful act on his part of known illegality, gross malversation, or criminal negligence, by whatever motive induced, whereby the owners or the charterers of the ship (in cases where the latter are considered owners pro tempore) are, in fact, damaged.* (h) ¹

With regard, indeed, to the *proof of criminal intent* necessary to constitute barratry there is an obvious distinction, arising from the different nature of the acts relied upon as *barratrous*.

Where the act of alleged barratry, as in the case of illegal trading with the enemy, or cutting the ship's cable so as to let her drift on the rocks, is in itself manifestly unlawful or criminally negligent, no proof need be given, in order to show the act *barratrous*, of the master's having acted with a fraudulent intent to injure his owners; nay, even if it can be shown, as in the case of trading with the enemy, that it was done with a view to the owner's benefit, yet, if it was against, or not in consequence of, his instructions, it will still be *barratry*.²

On the other hand, where the act itself, as in cases of deviation, is not thus, on the face of it, criminal or fraudulent, proof must be given of a fraudulent or criminal intent on the part of the master either secretly to benefit himself, or to injure his owners, before such an act can be adjudged *barratrous*. (i) ³

(A) The tersest and (perhaps) best definition of barratry is that given by Lord Hardwicke in *Lewen v. Suasso* (Posthuma's Dict. 177, tit. Assurance,) viz. that it is "*an act of wrong done by the master against the ship and goods.*"

(f) See the concluding observations of Lord Ellenborough in *Earle v. Rowcroft*, 8 East, 139.

Loss by barratry.

Definition of barratry.

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Intent to injure or defraud owners need not be proved where the act is on the face of it illegal, or criminally negligence; *aliter*, where it is not so.

b. And it may be committed by the master in respect to the cargo, though the owner of the cargo is at the same time owner of the ship, and though the master is also supercargo or consignee for the voyage. *Cook v. Com. Ins. Co.* 11 John. 40.

¹ See *Patzpaco Ins. Co. v. Coulter*, 3 Peters, (S. C.) 222. Mr. Chancellor Kent defines barratry as "fraudulent conduct on the part of the master, in his character of master, or of the mariners, to the injury of the owner of the ship or cargo, and without his consent; and it includes every breach of trust committed with dishonest views." 3 Kent, (5th ed.) 305. See *Marcardier v. Chesapeake Ins. Co.* 8 Cranch, 39; *Arner. Ins. Co. v. Dunham*, 15 Wendell, 9, 10, 11.

² See post, 822, et seq.

³ See *Wiggia v. Amory*, 14 Mass. 1; *M'Intyre v. Bowne*, 1 John. 229; *Hood v. Nesbitt*, 2 Dallas, 137; *S. C. 1 Yeates*, 114; *Stewart v. Ins. Co.* 1 Humph. 242.

Loss by barratry.

Losses arising from the ignorance or mistake of the captain, however gross, are not losses by barratry, unless he acted against his better judgment.

822 *

It must also be carefully borne in mind that, in the absence of fraud, nothing but acts of known criminality, gross malversation, or negligence so gross as to be clearly fraudulent and criminal, can amount to barratry; ¹ loss arising from the ignorance or incompetence of the captain, from a mistake as to the meaning of his instructions, or misapprehension of the best mode of carrying them into effect, can never amount to *barratry. The master, in fact, before he can be proved to have acted barratrously, must be shown to have *acted against his better judgment*; if he merely acted up to the best of his judgment, however bad, this is not barratry. (j) ²

Thus, where the captain of a sea-damaged ship, before survey, broke up her ceiling and end-bows with crow bars, and thereby injured her, but no proof was given of his having been actuated by any criminal intent in so doing, Lord Ellenborough said — “To constitute barratry, which is a crime, the captain *must be proved to have acted against his better judgment*; as the case stands there is a whole ocean between you and barratry.” (k)

No act can be barratry in the master to which the owners are consenting parties.

Another principle, clearly flowing from the true notion of barratry as a criminal act committed by the *master against the interest of the owners* (whether fraudulently or not,) is, that no act can be barratrous to which the owners can in any way be shown to have been consenting parties; *for no man can take advantage of his own wrong.* (l) ³

Cases of loss by barratry.

§ 308. Having thus indicated the leading principles by which to determine whether a loss is barratrous or not, we will proceed to examine what has been held in practice to amount to barratry.

(j) *Phyn v. Royal Exch. Ass. Comp.* 7 T. Rep. 505. *Todd v. Ritchie*, 1 Stark. 240. *Bottomley v. Bovill*, 5 B. & Cr. 212. (k) Per Lord Ellenborough in *Todd v. Ritchie*, 1 Stark. 240. (l) See *Stamma v. Brown*, 2 Str. 1247.

¹ See *Wiggin v. Amory*, 14 Mass. 1; *Walden v. Fireman's Ins. Co.* 12 John. 128. It is not an act of barratry for a crew to leave a ship captured and libelled as prize, if they do it not *malò animo*. *Messonier v. Union Ins. Co.* 1 Nott & M'Cord, 155.

² See *Patapasco Ins. Co. v. Coulter*, 3 Peters, (S. C.) 222; *Grim v. Phoenix Ins. Co.* 13 John. 457; *post*, 623, and in note.

³ *Ward v. Wood*, 13 Mass. 539.

In the earliest case on the subject it was decided that sailing out of port without paying port dues, whereby the ship and goods were subjected to forfeiture, was barratry (*m*): *so sailing out of port* without leave, in *breach of an embargo*, in consequence of which the owners afterwards sustained a loss, in respect of seamen's wages and provisions, by the detention of the ship, was ruled by Mr. J. Buller at Nisi Prius, and not denied by the full court, to be barratry. (*n*)

Loss by barratry.

Sailing out of port without paying port dues, or in breach of an embargo.

*So the *wilful and intentional* breach of a blockade, by the master's sailing towards, into, or out of a blockaded port, without the knowledge or consent of the owners, though it may be with a view to their benefit, is barratry.¹

* 823

Wilful breach of blockade.

Thus, where the master of a ship which had sailed from Hamburg for a port in England, wilfully and without the knowledge or consent of the owners, shaped his course for a blockaded port in Holland, in consequence of which the ship was seized and condemned, this was held to be a loss by barratry, for which the underwriters on goods were liable. (*o*)

But where the evidence in the cause, although it showed that the captain had in fact violated a blockade, in consequence whereof the ship had been seized and condemned, yet was quite consistent with the supposition that the captain might have done so either ignorantly or in obedience to orders from his owners, the court held that this did not amount to proof of barratry. (*p*)

But it must be clearly shown to be wilful.

In fact, *breach of blockade is only barratry* in the master when committed by him wilfully and knowingly, and without the consent, though possibly with a view to the interest, of his owners. If broken by his own ignorance or his owner's directions, it is no barratry.²

(*m*) Knight v. Cambridge, as cited by C. J. Lee in *Stamma v. Brown*, 2 Str. 1174, and by Lord Ellenborough in *Earle v. Rowcroft*, 8 East, 135, 136. (*o*) *Goldschmidt v. Whitmore*, 3 Taunt. 508.

(*n*) *Robertson v. Ewer*, 1 T. Rep. 127, cited by Lord Ellenborough in *Earle v. Rowcroft*, 8 East, 139. (*p*) *Everth v. Hannam*, 6 Taunt. 375. 2 Marsh. 72, S. C. The American authorities are collected by Mr Phillips (vol. i. pp. 600-611): they do not appear quite consistent, either with one another or our own law.

¹ See *Richardson v. Maine F. & M. Ins. Co.* 6 Mass. 102; *Calhoun v. Ins. Co. of Penn.* 1 Binney, 321; *Voss v. Union Ins. Co.* 2 John. Cas. 197.

² In *Dederer v. Delaware Ins. Co.* 2 Wash. C. C. 61, Mr. Justice Washington said, — "that if the captain ignorantly commit a breach of blockade, or violate some

Loss by barratry.

Resistance to right of search, or attempt at rescue, is barratry in the United States.

824 *

Illegal trading without instructions from the owners, though with a view to their benefit, is barratry.

Earle v. Rowcroft, 8 East, 126.

It has been held in the United States, and apparently on good grounds, that the loss of a neutral vessel, consequent either upon a wilful resistance of the right of search, or an attempt to rescue her when rightfully detained and sent in for examination by a belligerent cruiser, is a loss by barratry. (q) ¹

Illegal trading, in consequence of which the vessel is seized and condemned, if knowingly carried on by the captain without the directions, though principally with a view to the benefit, of his owners, is an act of barratry.

In the year 1804, while England was at war with Holland, then virtually forming part of the French empire, an English ship was insured for a slaving voyage from Liverpool to the African coast, there to stay and trade, and proceed thence to a port of sale in the West Indies. The captain, who was furnished with letters of marque against the French and *Dutch*, and who was also *supercargo* as well as master, and entitled, besides his regular pay, to *commissions on his purchases*, being on the African coast, and not finding a good market in the *British* settlements there, put into D'Elmina, a Dutch fort on that coast, where he knew it was illegal for him to enter, and there exchanged his cargo, consisting, amongst other things, of muskets and warlike stores, for slaves. He had no instructions from his owners to go in there, but his object in so doing was to complete his cargo as cheaply and expeditiously as he could.

In consequence of this act his vessel was seized by a British cruiser, and condemned.

Lord Ellenborough, upon the principles already stated, held this to be a loss by barratry. (r)

Upon the same principle it has been held to be barratry in the captain of a merchant ship to *cruise* contrary to the apparent intention, and inconsistently with the instructions, of his owners.

(q) † *Doderer v. Delaware Ins. Comp.* Hall's Law Journ. 526. } Cited 1 Phil-
2 Wash. C. C. Rep. 61. † *Willcocks v.* lipe, Ins. 611, 612. In the case last cited
Union Ins. Comp. 2 Binney, 579. } *Brown* there was a warranty of neutrality.
v. Union Ins. Co. of New London, 6 (r) *Earle v. Rowcroft*, 8 East, 126.

It is barratry in the captain of a merchant ship, though furnished for a particular purpose with letters of marque, to *cruise*, if so doing be contrary to the apparent intention and inconsistent with the instructions of his owners.

Moss v. Byrom, 6 T. Rep. 379.

foreign ordinance, the illegality of the act will not make it barratry." See also *Voss v. Union Ins. Co.* 2 John. Cas. 187; *Grim v. Phoenix Ins. Co.* 13 John. 451.

¹ See *Robinson v. Jones*, 8 Mass. 536; *Brown v. Union Ins. Co.* 5 Day, 1.

The owners of a ship chartered for a voyage from Liverpool to the West Indies and back, furnished her with letters of marque for the homeward voyage, *merely for the purpose of inducing seamen to ship, and without any intention that the vessel should in fact cruise*; and accordingly the clearances requisite by statute to authorize the ship to cruise were not taken out. *Their instructions to the captain were to proceed from the West Indies to Liverpool with all expedition, no mention being made of the letters of marque.*

Loss by barratry.

The captain, however, after getting out to sea, with the consent of the major part of the crew, commenced cruising, and having plundered one American vessel, after some days took another, which he carried into Bermuda, where his own vessel was driven ashore in a storm, and the cargo lost.

* 825

The court held that this cruising, though possibly done with a view to benefit the owners, yet, being in fact a breach of his duty to them and resulting to their prejudice, was an act of barratry. (s)¹

Smuggling on the voyage, in fraud of and without the consent of the owners is barratry. And the owners may recover against the underwriters in respect of a forfeiture of the ship incurred by the captain's fraudulently taking smuggled goods on board without their consent, even though the ship is only insured by the policy "*on any lawful trade*;"

Smuggling on the voyage without the privity of the owners, is barratry, for which they may recover under a policy, in which the ship is only insured "*on any lawful trade*." Havelock v. Hancill, 3 T. Rep. 227.

(s) Moss v. Byrom, 6 T. Rep. 379.

¹ Wiggin v. Amory, 14 Mass. 1, somewhat resembles the case of Moss v. Byrom. In Wiggin v. Amory, the captain took a letter of marque, with an understanding, that he was to use it only for defence. He met with a vessel on the voyage, which was found to be an American vessel lately captured by the British, and which, having but little force on board, surrendered to him without resistance. He stopped between two and three hours to take possession of the prize, and put a prize-crew on board of it. This was held to be a deviation such as to discharge the underwriters on that ground. But the question arose whether the facts made out a case of barratry. The court remarking on the case of Moss v. Byrom, said, "if that case stood alone, it would go far to support the claim of the assured on that ground." But upon comparing the case of Moss v. Byrom with cases afterwards decided, and especially with that of Phyn v. Royal Exch. Ass. Co. cited post, 827, the inference could hardly be avoided that the circumstances of the former case were considered to afford an imputation of crime or fraud against the master, in which it was distinguished from Wiggin v. Amory. In this latter case the court regarded the conduct of the captain to be rather a mistake of his duty, than any gross malversation, as he acted by the advice of the supercargo, and also of the owner of a part of the cargo, who was on board; and they held the case not to be one of barratry. See also Wiggin v. Boardman, 14 Mass. 12.

Loss by barratry.

Aliter, if the owner have been grossly negligent in not repressing the smuggling.
Pipon v. Cole, 1 Camp. 434.

Mutinously carrying the ship out of her course, or purposely running her ashore, is barratry; or fraudulently procuring her to be condemned and sold.

826 *

Cases in which the misconduct of the master, though not fraudulent in the usual sense, has been held barratrous.

for these words, "lawful trade," mean the trade in which the ship is employed *by her owners*, and not any unlawful commerce in which the captain may barratrously engage, without their concurrence. (t) ¹

But although the owner may not have directly connived at the smuggling, yet, if, by his gross negligence, acts of smuggling have been repeatedly committed by the mariners, after warning, and within a very short interval, he shall not recover for the loss occasioned by these their barratrous acts. Thus, where a ship had three times been seized after three successive trips, for three distinct acts of smuggling by the crew, the owner was not allowed to recover, under a count for barratry, for the average loss occasioned by the expenses to which he had been put in procuring restitution, and repairing damage incurred while the ship was the third time under seizure. (u)

Of course, if the ship is violently carried out of her course, and fraudulently run away with by the captain and crew, this is a clear case of barratry, and in such case the act of barratry commences from the moment the ship is so carried out of her course. (v)

*Purposely running the ship on shore, without justifying necessity, is a clear case of barratry in the captain. (w) And so is fraudulently procuring the ship to be condemned and sold: but in such case the act of barratry (as a "*cause of action*," under the statute of limitations,) dates, not from the period at which the master abandoned the voyage, or even from the *condemnation* of the ship, but from the completion of the transaction by her delivery and sale. (x)

§ 309. In the instances just mentioned, the acts of the captain were manifestly criminal and fraudulent; and, being to the prejudice of the owners, and in breach of his duty to them, clearly amounted to barratry.

(t) *Havelock v. Hancill*, 3 T. Rep. 227. 349. *Dixon v. Reid*, 5 B. & Ald. 597. 1

(u) *Pipon v. Cole*, 1 Camp. 434. D. & Ryl. 207.

(v) *Falkner v. Ritchie*, 2 Maule & Sel. (w) *Soares v. Thornton*, 7 Taunt. 627.

200. *Brown v. Smith*, 1 Dow's P. C. 1 Moore, 373, S. C.

(x) *Hibbert v. Martin*, 1 Camp. 538.

¹ *S. P. American Ins. Co. v. Duham*, 15 Wendell, 9; *Suckley v. Delafield*, 2 Caines, 222; *Wilcocks v. Union Ins. Co.* 2 Binney, 579.

But there is also no doubt that the misconduct of the master may be so gross and culpable as to amount to criminality; and in such case, if the owners be damnified by it, it will be barratrous, though unaccompanied by *fraud* in the ordinary sense of that term.

Loss by barratry.

Thus, where the pilot swore that the captain, who had before refused to sail when the wind was fair, persisted in doing so, contrary to his directions, when it was unfavorable; and still disregarding the pilot's instructions, cut the cable, so that the ship drifted on the rocks; Lord Ellenborough held that this, if true, would amount to barratry in the captain though there was no fraud, it being a *gross malversation* by the captain in his office. (y)

Cutting ship's cable contrary to the directions of the pilot, whereby she drifts on the rocks, is barratry. *Heyman v. Parish*, 2 Campb. 149.

There are cases in which to do nothing may be as criminal and mischievous as any positive acts. In such cases there seems little doubt that the wilful non-feasance of the master, if productive of mischief to the owner, would be barratrous.

Nonfeasance may in extreme cases amount to barratry.

Thus, if a master sees another in the act of scuttling or firing the ship, and will not rise from his berth to prevent it, he is *prima facie*, chargeable with barratry: for, though a mere non-feasance, it is a breach of trust, a fault, an act of infidelity to his owners. (z)

* 827

But short of this *criminal* degree of negligence, no loss occasioned by the mere ignorance, incompetence, and carelessness of the master, can constitute an act of barratry.

Thus, a deviation from the lawful course of the voyage, though intentional or the result of gross ignorance, will not amount to barratry. "*Unless accompanied with fraud or crime no case of deviation will fall within the true definition of barratry.*" (a) ¹

Thus, where a captain, *whose instructions were to proceed immediately from London to Jamaica*, having been carried by currents out of his reckoning, and finding himself at a point between the Grand Canary and Teneriffe, whence his direct course to Jamaica was *south-west*, instead of taking it, bore up

But deviation from gross ignorance, apart from fraud, is not barratry. *Phyn v. Royal Exch. Ass. Comp.* 7 T. Rep. 505.

(y) *Heyman v. Parish*, 2 Camp. 149.

Couker, 3 Peters (S. C.) Rep. 222, cited

(z) Per Mr. J. Johnson in the American case of *† Patapasco Ins. Comp. v.*

1 Phillips on Ins. 613.

(a) Per Lord Ellenborough in *Earle v. Rowcroft*, 8 East, 139.

¹ *Ante*, 820, and cases cited in note to this point.

Loss by barratry.

north-west, to Santa Cruz, which was then in sight, where his ship was laid under embargo, and condemned as prize, the jury having found that this was a deviation, and was owing to ignorance or something else, *but that it was not fraudulent*, the court held it not barratrous. Mr. J. Lawrence said, "that he knew of no case in which it is said that the act of the captain is barratrous merely because it is against the interest of the owners: it must be done with a *criminal intent*; the jury here having negatived fraud, had negatived criminality; therefore this was not a barratrous deviation." (b)

Mistake as to meaning of sailing instructions, in consequence whereof captain sails on an unauthorized voyage, is not barratry. *Bottomley v. Bovill*, 5 B. & Cr. 210.

828 *

The captain of a convict ship sailed from London for Sidney, with orders, after discharging his convicts there, to proceed thence for South America, taking New Zealand on his way; some time after he had arrived in Sidney, and after he made all his arrangements for sailing thence to New Zealand, he received fresh instructions from his owners, directing him to proceed at once from Sidney to the East Indies; under these circumstances the captain resolved, contrary to the letter of his last instructions, to make his voyage to New Zealand and back, before prosecuting that from Sidney to the East Indies: he sailed accordingly, and the ship was lost on her return from New Zealand: it was contended at the trial that this was barratry in the captain, but Lord Tenterden told the jury, that "barratry meant an act of the master in fraud of his duty to his owners;" and that a mere mistake or misapprehension by the captain as to the meaning of his sailing instructions, or as to the best means of carrying them into effect, could not amount to barratry. (c)

After, where captain deviates in fraud of his duty to his owners, and unknown to them. *Vallejo v. Wheeler*, Cowp. 143.

Where, on the other hand, the captain deviates from the proper course of the voyage *in fraud of his duty to his owners, and for his own private purposes unknown to them*, this is an act of barratry from the moment the ship is carried out of her course.

Thus, where the captain of a ship insured from London to Seville, sailed for Guernsey, out of the course of the voyage, *to take in brandy and wine on a smuggling adventure of his own, unknown to the charterer* (who was owner pro hac

(b) *Pyn v. Royal Exch. Comp.* 7 T. Rep. 505. N. B. From this case it is obvious that *fraud*, in speaking of barratry, means the same thing as *criminality*. (c) *Bottomley v. Bovill*, 5 B. & Cr. 210.

vice,) and the night after sailing sprung a leak, which compelled him to put back, and ultimately to abandon the voyage; this was held by Lord Mansfield to be a clear case of barratry. (d)

Even dropping anchor and going ashore in a boat to find a market for his own private adventure of negroes on board, was held by Lord Kenyon to be barratry in the captain, commencing from the moment of his first going out of his course for that purpose. (e)

Unreasonable delay, generally, as we have already seen, discharges the underwriter, as a variation of the risk: but where this delay is employed by the captain for the purpose of committing an act of barratry (as by an elaborate forgery of all the ship's documents, &c.,) then the detention is part of the barratry for which the underwriters are liable, and *not a deviation by which they are excused. (f) "*Criminal delay*," in fact, as expressed by Mr. Justice Park, "is a barratrous act." (g)

Detention of the ship and consequent expense owing to an incorrectness in her manifest, is not a loss by barratry, unless clear proof be given that the incorrectness was wilful. (h)

If the captain is compelled, by the mutinous violence of the crew, to deviate from his course, though in the teeth of express instructions to the contrary, this will neither be such a deviation as to discharge the underwriters, nor will it be "*barratry of the master*," although, as it seems, it would be barratry of the mariners. (i)

There have not been many decisions as to what will amount to *barratry by the mariners*; but it seems quite clear, that when any crime or fraud attended by or producing the loss or destruction of the ship be committed by the mariners, under such circumstances of violence or treachery, *that it could not have been prevented by the prudence or vigilance of*

Loss by barratry.

Even dropping anchor and going ashore in fraud of owners and for his own private benefit, is barratry. *Ross v. Hunter*, 4 T. Rep. 33.

Delay for unlawful purposes, in fraud of owners, is barratry. *Roscow v. Corson*, 8 Taunt. 684.

* 829

Deviation compelled by mutinous violence of crew, is barratry of the mariners, but not of the master. *Elton v. Brogden*, 2 Str. 1264.

What will be barratry of mariners.

(d) *Vallejo v. Wheeler*, Cowp. 143. S. C. Lofft, 645.

(e) *Ross v. Hunter*, 4 T. Rep. 33.

(f) *Roscow v. Corson*, 8 Taunt. 684.

(g) *Ibid*.

(h) *Bradford v. Livy*, Ry. & Mood. 331. 2 C. & P. 137.

(i) See the case of *Elton v. Brogden*, as reported in 2 Str. 1264, and commented

upon by Lord Mansfield in *Vallejo v. Wheeler*, Cowp. 154; by Lord Alvanley in the case of *De Feise v. Stephens*, at the Cockpit, as cited Marshall on Ins. 523. note (b); and, lastly, by Sir James Mansfield in *Scott v. Thompson*, 1 Bos. & Pull. N. R. 186, and Park on Ins. 194.

8th ed.

Loss by barratry.

*the owner, or of the master, as his agent, this will be a loss by barratry of the mariners.*¹

If, indeed, the criminal or fraudulent conduct of the seamen is of such a nature, that the owner or master might with an ordinary exercise of force, or a reasonable degree of vigilance, have prevented it, this will not be a loss by barratry of the mariners, as we have seen in the case where the ship was confiscated for *repeated acts of smuggling* committed by the crew. (j)

Where, on the other hand, the crew overpower the captain, or constrain him to consent to their proceedings, the same acts would be barratry in them as in the master.

830 *

Loss well alleged to be by barratry of the mariners, though also caused by prisoners of war on board the ship. *Toulmin v. Anderson*, 1 Taunt. 227.

*Thus, where four of the mariners conspired with some prisoners of war on board, and having overpowered the master and the rest of the crew, ran the ship ashore, where she was captured; as it appeared that the owners and master had not been guilty of any gross negligence in failing properly to secure the prisoners on board; this was held to be a loss by the barratry of the mariners. (jj) And the judgment was the same in a case where only one of the crew, conspiring with some prisoners of war on board, forced the captain and the rest of the crew ashore and ran away with the ship. (k)

The rule, in fact, is, that where the cause of the loss is a superior force, originating with the crew, the underwriters are liable "as for barratry by the mariners."

ART. 2. *By and against whom Barratry may be committed—of General Owners and Charterers, or Owners pro hac vice.*

No act can be barratry which is authorized either by the general owners, or the owners for the voyage.

§ 310. Having thus seen what acts have been settled by the course of English jurisprudence to amount to barratry on

(j) *Pipon v. Cole*, 1 Camp. 434.

(k) *Hucks v. Thornton*, Holt's N. P.

(jj) *Toulmin v. Anderson*, 1 Taunt. 227. 40.

Toulmin v. Inglis, 1 Camp. 420. .

¹ The stealing of cargo by the mariners, (other than petty thefts,) is barratry; and a policy of insurance on the mate's adventure, against the barratry of the mariners, covers a loss by the theft of the mariners. *Stone v. National Ins. Co.* 19 Pick. 34. See *Hicks v. Fitzsimmons*, 1 Wash. C. C. 279.

the part of the master and mariners, we will proceed to consider by and against whom barratry may be committed. Loss by barratry.

As we have already seen, it is part of the very definition of barratry, that it is an act done by the masters and mariners in fraud of their duty to *their owners*; i. e. either the parties who are general owners of the ship, or the freighters, who, under the terms of the charter-party, are her special owners for the voyage.¹

Hence, from the very terms of the definition, it is plain that no act can be barratrous which is sanctioned or authorized by those who are either the absolute owners of the ship, or her owners for the voyage. "For," as Lord Mansfield says, "nothing is so clear as that no man can complain of *an act to which he himself is a party." (l) And in another place he says, "Barratry is something contrary to the duty of the master and mariners—in the relation in which they stand to the owners of the ship. *An owner cannot commit barratry*: he may make himself liable by his fraudulent conduct to the owner of the goods, *but not as for barratry*; and, besides, barratry cannot be committed against the owner *with his consent*." (m)²

* 831

Upon these principles it has been decided in the two following cases, that the owner of the goods cannot recover as for a loss by *barratry* in respect of any act of the master, however criminal, that is sanctioned by the owner of the ship.

Stamma, the plaintiff, shipped goods on board a vessel, which, by the bill of lading, was to sail with them straight from Falmouth to Marseilles, and he also insured them for the direct voyage; learning afterwards that the ship was to touch at Genoa, Leghorn, and Naples before putting into Marseilles, he protested against it; nevertheless, the ship, by the owner's directions, did put into these ports first, and was blown up by a Spanish ship on her way back to Marseilles; the plaintiff claimed to recover for this as a "*loss by barratry*;" but it was held that he could not do so, as the

Hence, the owner of the goods cannot recover as for a loss by barratry in respect of any act sanctioned by the owner of the ship. *Stamma v. Brown*, 2 Str. 1173.

(l) Cowp. 155.

(m) Per Lord Mansfield in *Nutt v. Bourdieu*, 1 T. Rep. 323.

¹ See *Stone v. National Ins. Co.* 19 Pick. 34, cited *ante*, 829, in note.

² *Ward v. Wood*, 13 Mass. 539.

Loss by barratry.

Nutt v. Bourdieu, 1 T. Rep. 323.

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Owners of ship having chartered her for the voyage, cannot recover as for a loss by barratry in respect of acts done by the charterer's agents. *Hobbs v. Hannam*, 3 Camp. 93.

Principle of this case.

master in what he had done had acted consistently with his duty to his owners, and with their privity. (n)

The master of a French ship, *at the instigation and by the direction of his owner*, who sailed on board, fraudulently signed false bills of lading, by which he made goods, that had been originally consigned to another firm, deliverable to the house of which his owner was a partner, and the goods under these false bills of lading were delivered to his owner's firm, and never paid for; the shipper of the goods sought to recover their value under a count alleging a loss by barratry, but Lord Mansfield, on the principles above laid down, held that he clearly could not do so, saying, "that to prevent this *would be entirely repugnant to every definition which had ever been laid down in an English court of justice." (nn)

Upon the same principle Lord Ellenborough held, that the owner of a ship, who had chartered her for the voyage, could not recover under a count for barratry for a loss occasioned by an illegal act of the charterer's agent, which, *per se*, would have amounted to barratry. *Hobbs*, the general owner of a ship, chartered her for the voyage to *Woodman*, who covenanted to pay *Hobbs* 3600*l.* in case of loss; *Woodman* addressed the ship to *Kendal*, whose orders he desired the captain implicitly to obey: the captain, in compliance with this direction, took in smuggled goods sent on board by *Kendal*, for which the ship was seized and condemned.

Lord Ellenborough held, that *Hobbs* could not recover as for a loss by barratry, the loss being by construction imputable to himself. (o)

"If I give the dominion of my ship to a charterer," said his lordship, "his acts are my acts: and in this case *Kendal*, whose orders the master implicitly obeyed, according to his instructions, was, in point of law, the agent of the plaintiff. Therefore the loss arose from following his own orders, and there is no pretence for imputing it to barratry." (p)

(n) *Stamma v. Brown*, 2 Str. 1178. See the remarks of Lord Ellenborough, 8 East, 135, 136.

(nn) *Nutt v. Bourdieu*, 1 T. Rep. 323.

(o) *Hobbs v. Hannam*, 3 Camp. 93. But see *Boutflower v. Wilmer*, Selw. N. Pr. 976. 9th ed.

(p) *Hobbs v. Hannam*, 3 Camp. 94. In Selw. N. Pr. 976. 9th ed. MS. a case

of *Boutflower v. Wilmer* is cited, in which the point decided was, that the owner *may* recover for an act of barratry committed by the master with the privity of the freighter; but the distinction between these two cases, supposing both can be supported, must depend on the terms of the respective charter-parties, which are not given in either.

Upon the same principle it is clear that barratry cannot be committed by a master who is owner or part owner of the vessel.¹

If, however, there be any question whether he is owner or not, it lies upon the underwriters to show that he is so :² it is sufficient for the assured to have made out an act *prima facie* barratrous; and if the underwriter insists on it as a *defence that the master was also owner or general freighter, it is incumbent on him to prove that he was so. (q)

Where the captain was *general* owner of the ship which he had bottomried and mortgaged, but of which he still had the *control and navigation*, Lord Hardwicke held that he could not commit barratry, so as to give the assured on goods a claim against his underwriters as for a loss by barratry. (r)

So, where the master had given his promissory note for the amount of the purchase money of a vessel, which was indorsed by another person, to whom the bill of sale was made out, and in whose name the ship was registered, as a collateral security, it was held in the United States that the master, under these circumstances, *having an equitable interest in the ship*, could not commit barratry. (s)³

The fact that the captain is also *supercargo*, or consignee of the goods, will not prevent the *owner of the ship* from recovering for loss occasioned for his barratrous acts, done in fraud of his duty as master (t); nor will the *owner of the goods* be prevented, on the same ground, from recovering for such acts; for they are not committed by the captain in his character of consignee, or supercargo, but in his character of *master of the vessel*; a character which he cannot lay aside until the entire completion of the risk." (u)

Loss by barratry.

Barratry cannot be committed by a master who is proved to be owner or part owner of the ship.
Ross v. Hunter, 4 T. Rep. 33.
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Lewin v. Suamo, Postlethwaite's Dict. 147.

Master having equitable interest in ship, cannot commit barratry.
United States.

But barratry may be committed by captain, though supercargo or consignee of the goods.

(q) Ross v. Hunter, 4 T. Rep. 33.

(r) Lewin v. Suamo, Postlethwaite's Dict. art. Assurance, p. 147.

(s) † Barry v. Louisiana Ins. Comp. 11 Martin's N. S. 630, cited 1 Phillips Ins. 618.

(t) Earle v. Bowcroft, 8 East, 126.

(u) Emerigon, chap. xi. sect. 3. tom. i. p. 370. ed. 1827; and see the American cases, † Kendrick v. Delafield, 2 Caines, 67. † Cook v. Commercial Ins. Comp. 11 John. Rep. 40, cited 1 Phillips on Ins. 614, 615. See also Boulay-Paty, tom. iv. p. 76. ed. 1825.

¹ Marcardier v. Chesapeake Ins. Co. 8 Cranch, 30.

² Steinback v. Ogden, 3 Caines, 1; M'Intyre v. Bowne, 1 John. 229.

³ The hirer of a vessel for a term of time, even by parol, is so far the owner that he cannot commit barratry. Taggard v. Loring, 16 Mass. 338.

Loss by barratry.

When are charterers to be considered owners in relation to barratry?

This depends on the construction of the charter-party.

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Threefold division of charter-parties, as regards the dominion they confer on the charterer.

§ 311. Barratry, as we have seen, is an act prejudicial either to the general owners of the ship, or to the charterers, when, under the terms of the charter-party, the latter acquire such an interest in, or control over, the ship as to make them owners in relation to the master and mariners for the voyage.

The question when charterers can be considered owners in relation to barratry, depends mainly upon the true construction and effect of the whole of the charter-party, and cannot be determined by any general rules.

Charter-parties, as far as relates to the dominion they confer over the ship upon the charterer, are of three kinds:

1. Either the contract is *locatio operis vehendarum mercium* — a mere covenant to carry the charterer's goods in the owner's ship either at a gross sum, or so much per ton, &c.: or, 2. It is *locatio navis et operarum magistri* — a letting of the ship in a state fit for the purposes of mercantile adventure, i. e. with the master and mariners on board, as well as all other means necessary for her navigation: or, 3. (which is a much less frequent case) It is *locatio navis* — an absolute demise of the ship herself with her furniture and apparel, leaving the master and mariners to be hired, paid, and victualled by the charterer.

Now in the first and last of these cases, the question of the charterer's ownership, in relation to the master and mariners, presents no difficulty.

In the first case it is quite clear that he has no such ownership, the entire possession of the vessel, and the management and control of the captain and crew, resting entirely with the general owner.¹

In the last case it is equally clear that the charterer is vested with the absolute dominion of the ship for the voyage, and stands in relation of owner to the captain and crew, whom he appoints, and who act under his control.²

It is in the second case that the difficulty has mainly arisen:

¹ See *Marcardier v. Chesapeake Ins. Co.* 8 Cranch, 39; *M'Intyre v. Bowne*, 1 John, 229.

² *Hallett v. Columbian Ins. Co.* 8 John, 272.

with regard to this class of charter-parties it may be laid down, that whatever, from the whole tenor of the instrument, without paying any undue regard to particular expressions, such as "demise and let," &c., it may fairly be collected to have been the intention of the parties that the charterer should have the substantial control and exclusive use of the ship for the voyage,—this will constitute him owner *pro hac vice* (at all events, in relation to barratry,) although the master and crew may be appointed and paid by the general owner. The possession or control thus exercised *by the general owners over the master and mariners, such as it is, being, in the words of Lord Ellenborough, "not retained by them, in order to restrain or interfere with the full and free use of the ship which they have let to hire for a term, but as subsidiary and subservient to such use." (v)

In fact, in such cases it is not only the ship that is hired, but along with it, the services of a certain number of persons paid by the general owners, such services being necessary to the use and navigation of the ship for the voyage: as Lord Ellenborough puts it in the same case: "it is the same thing as the hire of a *wagon and team* for a certain time: the proprietor of the wagon stipulating that the wagon should be driven, and the horses taken care of, by his own wagoner, and both fed by himself." (w)

The test, in short, is this; was the charterer, upon the true construction of the charter-party, and under the whole circumstances of the case, invested, for the time being, and for the purposes of the voyage, with *the effectual and substantial control* over the ship, master, and mariners, notwithstanding the latter were in the pay and general service of the general owner.

Most of the cases in which the point has arisen have turned directly on the construction of charter-parties, and the question has been whether the charterer has been so far constituted thereby owner for the voyage, as either to create in him a liability to third parties in respect of repairs, necessary ex-

Loss by barratry.

The difficulty arises in that class of cases where the charter-party is *locatio navis et operarum magistri*,—a letting of the ship, for the voyage, with the services of the master and crew.

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When the charterer shall be considered owner *pro hac vice*, under charter-parties of this description.

Rule derivable from the cases.

In most cases the question has been as to the charterer's liability to third parties, or the general owner's lien for freight.

(v) Per Lord Ellenborough in *The Trinity House v. Clark*, 4 Maule & Sel. 268.

(w) *Ibid.*

Loss by barratry.

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Cases in which the question has been, whether the charterer is so far owner for the voyage as that barratry may be committed against him by the master and mariners, even with the privity or instrumentality of the general owner.

Vallejo v. Wheeler, Cowp. 143.

penditures, or breaches of duty (x);¹ or to take away from the general owner his right of *lien for freight*. (y)²

*Without any further reference to the cases which have been decided on these points, we will proceed at once to examine those in which the question has been, *whether the charterer is so far constituted owner for the voyage as that barratry may be committed against him by the master and mariners, even with the privity or instrumentality of the general owner.*

The first case was that of *Vallejo v. Wheeler*, of which the material facts were as follows:—

Willes, the general owner of a ship, had, through *Brown*, his captain, chartered her to *Darwin*, for a voyage from London to Seville. (z) *Darwin* put her up as a general ship, and several merchants, amongst others the plaintiff, sent goods by her, for which they were to pay freight to *Darwin*: the terms of the charter-party are not set out, but it should seem that the master and mariners were hired and victualled by *Willes*, the general owner.

On the voyage, the master, with the privity of *Willes*, the general owner, but without the knowledge of *Darwin*, the charterer, put into Guernsey, which was out of his course, to smuggle wine and brandy on a private adventure of his own: immediately after sailing from Guernsey the ship sprung a leak, to repair which she was obliged to put into Dartmouth, and, in proceeding thence, to the coast of Cornwall, where, by the policy, she had liberty to touch, she received

(z) See as to these points, *Parish v. Crawford*, *Abbott on Shipping*, 32, 6th ed. *James v. Jones*, *ibid.* 3 Esp. 27. *MacKenzie v. Rowe*, 2 Camp. 482. *Trinity House v. Clark*, 4 Maule & Sel. 288. *Newbury v. Colvin*, 7 Bingh. 190. S. C. in the House of Lords, 1 Clark & Fin. 283. *Dean v. Hogg*, 10 Bingh. 345; and see the remarks of Mr. Serjt. Shee, *Abbott on Shipping*, 45, 46, 6th ed.

(y) As to this point, see *Hutton v. Bragg*, 7 Taunt. 14. *Tate v. Meek*, 8 Taunt. 280. *Yates v. Railston*, *ibid.*

293. *Yates v. Meynell*, *ibid.* 302. *Saville v. Campion*, 2 B. & Ald. 503. *Christie v. Lewis*, 2 Brod. & Bingh. 410. *Faith v. East India Comp.* 4 B. & Ald. 630. *Campion v. Colvin*, 3 Bingh. N. C. 17. See these cases collected and commented on in *Abbott on Shipping*, 220 - 230, 6th ed.

(x) The names are reversed in the report in Cowper; but the error is corrected by Mr. J. Buller, who had been one of the counsel in the cause, in *Nutt v. Bourdieu*.

¹ See *Abbott on Ship.* (6th Am. ed.) 35, in note, 57, in note.

² See *Abbott on Ship.* (6th Am. ed.) 268, 269, in note, 299, 300, in note.

further injuries, by which she was totally disabled from completing her voyage, and the goods were much damaged.

Loss by barratry.

Lord Mansfield held, that this act of the master's, although done with the privity of the *general owner*, yet being committed without the knowledge of Darwin, the charterer, who, under the circumstances, *was owner for the voyage*, was an act of barratry, for which the assured on goods might recover. (a)

*In the next case on the point, the facts were shortly these : —

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Soares & Co. of London, agreed by charter-party with *Fontés*, the owner and commander of a Portuguese brig, that the ship should carry a cargo of flax and hemp from London to Figueira, in Portugal ; that on her arrival there the captain should have liberty to take what goods he pleased on freight, *on his own account*, from Figueira to Pernau, in Russia, and that at Pernau he should take on board, on account of *Soares & Co.*, 100 tons of flax, to be delivered at Oporto ; that if *Soares & Co.* chose to fill her up with goods, over and above the 100 tons, they were to be at liberty to do so, otherwise the captain might fill her up. The ship was not chartered at a gross sum for the voyage, but freight was payable at so much per ton. The master and crew were hired, paid, and victualled by the owner. The ship, which was commanded for the voyage by Gouvea, a Portuguese, having taken out the hemp and flax from London to Figueira, sailed thence *in ballast* to Pernau, and there *was entirely filled up with as many goods as she could hold, by the agents of Soares & Co. the charterers.*

Soares v. Thornton,
7 Taunt. 627.

On her voyage back from Pernau to Oporto she was compelled, in consequence of sea-damage, to put into Dover, where *Fontés*, the owner, came on board, and took the command of her, and shortly afterward, Gouvea assenting, wilfully ran her ashore, by means of which the cargo was wholly lost.

Chief J. Gibbs, on these facts, held, that as *Soares & Co.* the charterers had *completely filled up the ship with their own goods at Pernau*, the ship must thenceforth have been con-

(a) *Vallejo v. Wheeler*, Cowp. 143 S. C. better reported in Lofft, 645.

Loss by barratry.

sidered as under their complete control; "*they had a right to require that she should then proceed without the control of any other person, except themselves, to her place of destination.*"

838 * At the time of the loss, accordingly, they were exclusive owners; and the act which produced the loss having been committed without their concurrence, though with the connivance *of the general owner, was, as against them, barratry. (b)

This case, therefore, decides that whenever charterers are so circumstanced at the time of loss, as to have a right to the complete control and management of the ship, they are owners for the purposes of barratry, and barratry may be committed against them with the connivance of the general owners.

The principle of decision adopted in the American cases on this subject appears to be somewhat different from our own, and the charterer there seems not to be considered owner for the purposes of barratry, except in those comparatively rare cases where the ship is absolutely demised, and the master and mariners are hired, paid, and victualled by him. (c) ¹

ART. 3. *What is proof of an Allegation of Loss by Barratry.*

Though barratry be not the proximate cause of loss, but only its remote occasion, the loss is recoverable under a count for barratry.

§ 312. Loss by barratry seems to form an exception to the general rule of *causa proxima non remota spectatur*: it is not necessary (in fact, it hardly ever is the case) that the barratrous act should be the proximate cause of the loss; if there have been barratrous conduct on the part of the master and mariners, and a loss subsequently happens as a remote, though not as a direct, consequence of the act of barratry, or

(b) *Soares v. Thornton*, 7 Taunt. 627. lected and commented upon by Mr. Phillips on Ins. vol. i. p. 620-623.

(c) See the American decisions col-

¹ See *Abbott on Ship*. (6th Amer. ed.) 35, in note, 57, in note; *Marcadier v. Chesapeake Ins. Co.* 8 Cranch, 39; *McIntyre v. Bowne*, 1 John 229; *Hallet v. Columbian Ins. Co.* 8 John. 272. The hirer of a vessel for a term of time, even by parol, is so far the owner that he cannot commit barratry. *Taggard v. Loring*, 16 Mass. 336.

if the barratrous act have only been a co-operative cause of loss, in conjunction with some other peril, this is still enough to entitle the assured to recover under a count for barratry.

Indeed, it might be inferred from the language of Lord Mansfield, in *Vallejo v. Wheeler*, that even though the subsequent loss be *not in any degree referable to the act of barratry*, still the loss may be recovered as a loss by barratry (d) : but it must be remembered that the case was one *of barratrous deviation ; and, besides, as his lordship himself adds, "there was a great deal of reason to say that the loss sustained was in consequence of the fraudulent deviation." (e)

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The true position seems to be, that the loss ought to be referable, at all events, in the way of remote consequence, to the prior act of barratry, although not necessarily in the way of immediate and direct effect.

Where, however, other perils have proximately caused the loss, it may be recovered under a count alleging it to be by those perils, though barratry may have been a co-operative or concurring cause.

Thus, if a ship were dashed to pieces by the winds, and waves, owing to drifting on the rocks, in consequence of the barratrous act of the captain in cutting her cable, this might be recovered either as a loss by perils of the seas or a loss by barratry. (f)

So, where a ship was captured by the enemy, through a barratrous agreement between her captain and the captain of the enemy, Lord Ellenborough held, that this might be recovered either as a *loss by capture* or a *loss by barratry*. (g)

Where goods were seized in consequence of the captain's barratrous breach of blockade, it was held that the foreign sentence by which they were condemned as enemy's property, could not prevent the plaintiff from recovering as for a loss "*by barratry* ;" for even if the sentence were conclusive of the fact of enemy's property, *still it was by the barratrous act of the captain that the goods had assumed that character*. (h)

(d) Whether the loss happened in the act of barratry, that is, *during* the fraudulent voyage, or *after*, it is immaterial. Cowp. 155.

(e) Cowp. 155.

(f) Heyman v. Parish, 2 Camp. 149.

(g) Arcangelo v. Thompson, 2 Camp. 620.

(h) Goldschmidt v. Whitmore, 3 Taunt. 508.

Loss by barratry.

Where the loss has been proximately caused by the perils of the seas, but remotely by barratry, it may be recovered either as a loss by those perils, or by barratry. Heyman v. Parish, 2 Camp. 149.

So where proximately caused by capture. Arcangelo v. Thompson, 2 Camp. 620. Or condemnation as enemy's property. Goldschmidt v. Whitmore, 3 Taunt. 508.

Loss by barratry.

But a sentence of condemnation for breach of blockade, is no proof of loss by barratry.

Everth v. Hannam, 6 Taunt. 375.

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If the loss be merely barratrous, it must be alleged to have been by barratry.

But a foreign sentence, stating the ship to have been seized for *breach of blockade*, is not conclusive evidence of barratry; for the breach of blockade might have been committed by the captain in ignorance, and without intention, in which case it would be no barratry. (i)

*The doubt expressed in this case, whether the assured could recover in respect of a seizure occasioned by a barratrous breach of blockade, without a count for loss by barratry, seems answered in the affirmative by the cases of *Heyman v. Parish*, and *Arcangelo v. Thompson*.

If, indeed, the loss be *merely barratrous*, the case would be different; thus, the assured could not recover for loss caused by a fraudulent sale, or by running away with the ship, except under a count for barratry. (l)

ART. 4. *Foreign Law as to Barratry.*

Barratry in most of the foreign policies has the same sense as in our own.

Barratry is a risk expressly excepted in some foreign policies, and omitted in others.

§ 313. Barratry, as the word is employed by the Italian jurists, and, generally speaking, in all the continental ordinances and policies, *except the French*, means, as it does in our law, the wilful and criminal misconduct of the master and mariners, and not their mere fault or negligence. *Non omnis navarchi culpa est barrataria, sed solùm tunc ea dicitur, quando committitur cum præexistente ejus machinatione, et dolo preordinato ad casum.* (m) Taken in this sense, it is a risk which is not insured against by the *common forms* of several of the foreign policies. Although it may, of course, be made the subject of insurance by express stipulation. (n) Barratry of the master and mariners is expressly excepted in the policies of Spain, Portugal, and Alexandria. (o) It is not insured against, without express written stipulations, in those of Genoa, Leghorn, and Naples, nor, in fact, in any port in the whole range of the Mediterranean coast except Marseilles,

(i) *Everth v. Hannam*, 6 Taunt. 375. 2 Marshall, 72.

(l) Per Lord Ellenborough in *Heyman v. Parish*, 2 Camp. 151. See also as to this point *Walker v. Maitland*, 5 B. & Ald. 171. *Blyth v. Shepherd*, 9 Mees. & Wel. 763.

(m) Casaregis, disc. i. No. 77, cited

by Emerigon, chap. xii. sect. 12. vol. i. p. 365.

(n) See the Genoa Commercial Code, 2 Magena, 67. No. 154.

(o) See Vaucher's Guide, *Alexandria* Policy, p. 1. *Cadix* Policy, p. 50. *Lisbon* Policy, p. 84.

and then only in insurances on French ships. (p) On the other hand, in the policies of the Dutch, German, Danish, * Swedish and Baltic ports, it is generally insured against, with some slight variations: thus, the *Amsterdam* policy insures against "the fault of the master and mariners, the circumstance occurring without the coöperation or knowledge of the assured. (q)

By the 53d article of the Insurance Code of Rotterdam, *shipowners* are prohibited from insuring against the *barratry* of masters appointed by themselves; but they may insure against their *neglect*, and against the barratry of the sailors, and of such master as may succeed to the command abroad, without their knowledge, upon the death or absence of the master originally appointed. (r) The same prohibition, as far as relates to the insurance against barratry by the shipowner, is to be found in the Boston (United States) policies, where the common printed form contains the enumerated risks; "barratry of the master (*unless the assured be owner of the vessel*) and of the mariners." (s)¹ With this exception, the policies of the United States, like our own, insure generally against the "barratry of master and mariners."

In France the Code de Commerce declares, by its 353d article, that "the insurer is not chargeable for the malversations and faults of the captain and crew, known under the term barratry of the master, unless there be a stipulation to the contrary."

It appears that the commissioners who digested the code, had intended to confine the word *barratry* to the sense of wilful and criminal misconduct ("*prevarication*") ; but, on the strong representations of the Royal Court of Rennes, as to the inconvenience that would arise from thus restricting the

Loss by barratry.

In others, again, it is enumerated amongst the ordinary perils.

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Prohibition in some countries of insurance by shipowners against barratry of masters appointed by themselves.

Law in France as to barratry. Code de Commerce, art. 353.

(p) See Vaucher, Comparative Table of Risks insured against, No. 1, and Introduction, p. xi.

(g) Amsterdam Policy, Vaucher, p. 7.

(r) Rotterdam Ordinance, Magens, vol. ii. p. 89. No. 251.

(s) Boston policy, Vaucher, p. 44. Emerigon laid it down as a rule of the law maritime, that the underwriters on

ships could not be liable for barratry of a captain appointed by the assured (shipowner): but Boulay-Paty, who examines the whole question, shows that this is a grave error. Emerigon, chap. xii. sect. 3. vol i. p. 367. et seq. Comment. of Boulay-Paty, *ibid.* p. 371, and see his Cours de Droit Com. Mar. tom. iv. p. 74. et seq.

¹ See Stone v. National Ins. Co. 19 Pick. 34; 3 Kent, (5th ed.) 305, note.

Loss by barratry.

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Present meaning of "barratry" in French law.

sense of the word within limits so much narrower than long usage *had assigned to it, they altered their intention, and, under the word "*fautes*," gave it its old extent. (t)

Boulay-Paty and Pardessus accordingly inform us that the word barratry in French law has the same meaning *since*, as it had *before*, the code, and embraces every fault of the master or mariners, by which a loss is occasioned, whether arising from fraud, negligence, unskilfulness, or mere imprudence. (u)

Those who wish to see to what extent *barratry* in this sense is insured against in French policies, cannot do better than refer to the very useful guide of Mr. Vaucher on Marine Insurances.

SECT. VII. Of Losses within the General Clause, "*all other Losses or Misfortunes, &c.*"

Of losses within the general clause, "all other losses or misfortunes, &c."

General and sweeping clause, as to "all other perils, losses, or misfortunes," covers other cases of sea damage of like kind with those specially enumerated.

Cullen v. Butler, 5 M. & Sel. 461.

§ 314. At the end of the enumeration by name of the different losses against which the underwriter undertakes to protect the assured, are added the words "*and of all other perils, losses, or misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods, merchandise, and ship, &c., or any part thereof.*"

This general and sweeping clause, it is now decided, covers other cases of marine damage, of the like kind with those specially enumerated and occasioned by similar causes.¹

Thus, Lord Ellenborough held in the first case in which the effect of this clause came before the courts for judicial determination, that, where one British ship had fired upon and sunk another, mistaking her for an enemy, this, though not a loss by perils of the seas, yet fell within the scope of the general clause, and was recoverable under a count in the

(t) Boulay-Paty, tom. iv. p. 62.

dearus, Cours de Droit Com. tom. iii. No.

(u) Boulay-Paty, tom. iv. p. 62. Par. 772.

¹ A policy against "all risks," covers every thing that may happen, except by the fraudulent act of the assured. *Goix v. Knox*, 1 John. Cas. 337; S. P. 2 John. Cas. 480. See also *Skidmore v. Deadoity*, 2 John. Cas. 77. As to losses recoverable by reason of general strains or injury done to the form and shape of the vessel, not capable of being repaired, see *post*, 957, in note.

declaration, specially stating the cause of loss as it really occurred. (v)

So, where dollars were thrown overboard by the master at *the moment of being captured, to prevent them falling into the hands of the enemy; the court held, that though this was not a *peril of the seas*, and probably not, strictly speaking, a *loss by jettison*, yet it clearly fell within the scope of the general clause, and was recoverable under a count specially alleging the true circumstances of the loss. (w)

So, where a ship, after discharging her cargo in her port of delivery, was put into a graving dock to repair, and there blown over by the wind and injured, as the ship at the time of the accident was *not water borne*, nor in *the ordinary course of her voyage*; this was held not to be a loss by *perils of the seas*, but one that clearly fell within the general clause, and was, therefore, recoverable under a special count. (x)¹

So, where a ship was bilged and rendered incapable of pursuing her voyage by the accidental giving way of her tackle and supports, in the act of being moved out of a dock into which she had been put for repairs, out of the ordinary course of her voyage; the loss thus occasioned was held to be included in the general clause, and to be recoverable under a special count. (y)

On the same principle, where an insurance was effected on goods "at and from London by land carriage to Harwich, and thence by packet to Gottenburgh:" it was held that the loss of these goods in the course of their land carriage from London to Harwich, was recoverable under a special count, in a policy in the common printed form. (z)

We will consider hereafter, in treating of the declaration, the expediency of adopting the special, or adhering to the general, count since the new rules. (a)

(v) *Callen v. Butler*, 5 Maule & Sel. 461.

(w) *Butler v. Wildman*, 3 B. & Ald. 380.

(x) *Phillips v. Barber*, 5 B. & Ald. 101.

(y) *Devaux v. J'anson*, 5 Bingh. N. C. 519.

(z) *Boehm v. Combe*, 2 Maule & Sel. 172.

(a) *Post*, Part IV.

Of losses within the general clause, "all other losses or misfortunes, &c."

Butler v. Wildman, 3 B. & Ald. 308.

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Phillips v. Barber, 5 B. & Ald. 161.

Devaux v. J'anson, 5 Bingh. N. C. 519.

¹ See *Ellery v. New Eng. Ins. Co.* 8 Pick. 14.

844 * **SECT. VIII.** *Losses not enumerated, but recoverable as the legal or necessary Consequences of the Perils insured against; as Salvage—Expense of necessary Repairs, and other Disbursements.*

Losses not enumerated, but recoverable as the legal or necessary consequences of the perils insured against; as salvage—expense of necessary repairs, and other disbursements.

The assured, as a general principle, may recover from the underwriter in respect of any *extraordinary* expenditures which he has been *necessitated* to incur in consequence of any of the perils insured against; and also in respect of all charges or contributions which, either by the law of the land, or the general law maritime, are attached as a direct legal consequence to these perils.

Thus he is liable to the assured in respect of sums which the latter has been compelled to pay by way of general average contribution, or by way of salvage, or in reclaiming captured property, or in repairing damage done to the ship by the perils insured against, &c.¹

The subject of general average contribution is of too great extent, and has too important a connection with the law of Marine Insurance to be treated of incidentally in this place, and must be reserved for a separate chapter.

ART. I. *Loss by Salvage.*

§ 314. *a.* With the subject of salvage, except so far merely as it concerns the assured and the underwriters, I do not propose to deal; the whole doctrine having been treated of with great fullness of learning and conciseness of style, in Lord Tenterden's well known Treatise on Shipping, to which

¹ See *Peters v. Warren Ins. Co.* 3 Sumner, 389; *S. C.* 14 Peters, (U. S.) 99; *Hale v. Washington Ins. Co.* 2 Story, C. C. 176; *ante*, 764, in note. Where a survey is properly made at a foreign port, in order to ascertain the amount of damage or the propriety of making repairs, if the damage is a loss by a peril insured against, the underwriters are to bear the expense of the survey. *Potter v. Ocean Ins. Co.* 3 Sumner, 27. But insurers are not liable for the expense of the survey of a damaged ship, made after her return to her home port. *Giles v. Eagle Ins. Co.* 2 Metcalf, 140, 145; *Brooks v. Oriental Ins. Co.* 7 Pick. 259.

branch of the law maritime its consideration more properly belongs. (a)

Referring the reader to that source for all further information on the subject, I will merely give the definition of the word, and mention the very few cases in which the question *has arisen as to the liability of the underwriters to make good the loss incurred by the assured in having to pay salvage.

Losses not enumerated, but recoverable as the legal or necessary consequences of the perils insured against; as salvage—expense of necessary repairs, and other disbursements.

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What salvage is.
When and to whom payable.

Salvage, then, is "the compensation that is to be made to other persons (*i. e.* persons not forming part of the crew) by whose assistance, a ship or its loading may be saved from impending peril, or recovered after actual loss." (b) ¹

It is payable either in case of shipwreck or other marine casualty, and of recapture, under the circumstance, and in the proportions fixed by various statutes that have been passed for the regulation of this branch of the law maritime. (c) ²

In the language of Lord Ellenborough, "it is a compensation to the salvors, not merely for the restitution of the property which has been made by them to the prior owners, (for that is properly an act of mere justice on their part,) but for the risk and hazard incurred by them, and for the beneficial service they have rendered the former owners in rescuing that property from the danger in which it was involved; *and the persons to contribute to that salvage are the persons who would have borne the loss had there been no such rescue, and who, of course, reap the benefit of that rescue.*" (d)

Who are to contribute to the payment.

The principles, in fact, are that the property actually benefited is alone chargeable with the salvage recovered; and that all property at risk when the recapture or recovery was

In respect of what property contribution to be made.

(a) Abbott on Shipping, part iv. chap. xii 6th. ed. { (6th Amer. ed.) 554 to 595. }

(b) Abbott on Shipping, part iv. chap. xii. p. 493, 6th ed. { (6th Amer. ed.) 554. }

(c) These are, 12 Ann. st. 2. c. 18, 26 G. 2. c. 19, 33 G. 3. c. 66, 43 G. 3. c. 66, 43 G. 3. c. 160, 48 G. 3. c. 130, 6 G. 4. c. 49.

(d) Per Lord Ellenborough in *Cox v. May*, 4 Maule & Sel. 132.

¹ Although salvage is often in the nature of a general average, it is not universally true, that, in the sense of our law, all salvage charges are to be deemed a general average; they are only so, when incurred for the benefit of all concerned. *Peters v. Warren Ins. Co.* 1 Story, C. O. 463.

² See numerous cases on this subject, cited in notes to Abbott on Ship. 554 to 556, (6th Am. ed.) No regulations have been made in respect to salvage by any statute of the United States, except in cases of recapture. *Ib.* 590, note.

Losses not enumerated, but recoverable as the legal or necessary consequences of the perils insured against; as salvage — expense of necessary repairs, and other disbursements.

Freight in course of being earned when salvage service done.

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By whom contribution in respect of such freight to be paid.
Cox v. May, 4 M. & Sel. 152.
Principles on which amount of salvage is regulated.

Judgment of Sir John Nicholl in the *Salacia*.

effected, for which the salvage was paid, and but for which the property would have been lost, must contribute to the expenses of salvage.¹

Hence it has been decided that if *freight* is in the course of being earned at the time of the salvage service, and it be afterwards actually earned in consequence of that service, it is liable to pay salvage, as well as the ship and cargo. (e)

Thus, too, it was determined that the *ship owners*, and not *the charterers were liable to pay the expenses of salvage to re-captors in respect to freight pending at the time of the recapture, and ultimately earned in consequence thereof; the charterers, again on the same principles, were alone held liable to defray the expense of establishing their claim to the *cargo*, and procuring the decree for its restitution. (f)

The amount of salvage to be awarded in particular cases does not properly fall within our consideration in this place; but the principles on which it rests are so comprehensively, and yet concisely, stated by Sir John Nicholl, that no apology can be required for inserting them here.

"Salvage," says that learned person, "is not always a mere compensation for work and labor; various circumstances upon public considerations; the interests of commerce, the benefit and security of navigation, the lives of seamen, render it proper to estimate a salvage reward on a more enlarged and liberal scale.

The ingredients of salvage service are, 1st. Enterprise in the sailors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures, and to rescue the property of their fellow-subjects.

2d. The degree of danger and distress from which the property is rescued; whether it was in imminent peril, and almost certainly lost, if not at the time rescued and preserved.

2d. The degree of labor and skill which the salvors display, and the time occupied.

4th. The value.

(e) *The Dorothy Foster*, 6 Rob. Ad. 210, cited in *Abbott on Shipping*, 509, 6th Rep. 88. *The Progress*, Edw. Ad. Rep. ed. { (6th Amer. ed.) 572. }

(f) *Cox v. May*, 4 Maule & Sel. 152.

¹ See *Hayliger v. N. York Firem. Ins. Co.* 11 John. 85.

Where all these circumstances concur, a large and liberal reward ought to be given : but where none, or scarcely any, take place, the compensation can hardly be denominated a salvage compensation : it is little more than a mere remuneration *pro opera et labore*." (g)¹

The liability of the underwriter for salvage depends not upon his having engaged to indemnify against it by any express words in the policy, but upon its being made by the law of the land, or the general law maritime, a direct and immediate consequence of perils against which he *does* insure.

Hence, in order to recover salvage expenses, the assured need not, and, in fact, ought not, to declare for *loss by the payment of salvage* ; but he should declare as for that species of loss which occasioned the payment of salvage — as, for loss by perils of the sea, in case of salvage from shipwreck ; for loss by capture, when the salvage is a remuneration to *recaptors*. (h)

Before an action will lie for a loss by payment of salvage upon a *recapture*, the amount of such salvage must have been ascertained by the decision of a court of admiralty ; and the plaintiff cannot legally make out his claim against the underwriter for a partial loss in respect of *this kind* of salvage without producing the proceedings of the admiralty court, to show the amount of the salvage, and expenses for which the underwriters are liable. (i)²

ART. 2. *Loss by Charges incurred in laboring "for the Defence, Safeguard, and Recovery" of the thing insured.*

§ 315. So much, then, for the liability of the underwriters in respect of losses incurred by the assured in having to pay salvage properly so called.

(g) *The Salacia*, Garland, 2 Hag. Ad. Rep. 202. cited in Abbott on Shipping, 496. 6th ed. { (6th Amer. ed.) 568. }

(h) *Cary v. King*, Ca. temp. Hardwicke, 304.

(i) *Thellusson v. Shedden*, 2 Bos. & Pull. N. R. 228.

Losses not enumerated, but recoverable as the legal or necessary consequences of the perils insured against ; as salvage — expense of necessary repairs, and other disbursements.

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Liability of underwriter for salvage : principle on which it depends.

Salvage expenses ought not to be claimed under a special count, but as incidental to the loss.

On recapture, amount of salvage must be ascertained, before loss by salvage can be sued for.

Clause by which the underwriters take on themselves the charges of endeavoring to recover, defend or preserve the thing insured.

¹ See Abbott, Ship. (6th Am. ed.) 554 to 556, in note.

² Where a sale of a vessel in the course of a voyage is rendered necessary to defray salvage, this of itself is held to create a total loss of the vessel for the voyage. *Williams v. Suffolk Ins. Co.* 3 Sumner, 510, cited *post*, 1071, in note.

Losses not enumerated, but recoverable as the legal or necessary consequences of the perils insured against; as salvage — expense of necessary repairs, and other disbursements.

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These charges (in all cases of abandonment and total loss) may be recovered by the assured from the underwriters, as money paid to their use. Or as a substantive average loss.

There is another species of liability totally distinct from, but sometimes confounded with, that just considered; the liability, I mean, which the underwriters take upon themselves by their own express stipulation in the policy, wherein they authorize "*the assureds, their factors, servants, and assigns, to sue, labor, and travel for, in, and about the defence, safeguard, and recovery*" of the thing insured, without prejudice to the insurance; and pledge themselves "*to contribute*" to the charges thereof, each one according to the rate and quantity" of his subscription.

Under this clause, in all cases wherein the assured has given notice of abandonment which the underwriters have accepted, or wherein the loss ultimately turns out *total* with benefit (as it is termed) of *salvage (j)*, the assured may recover the expenditures he has incurred in endeavoring to save the wrecked and stranded property, as money *paid to the use of the underwriters*; and perhaps it would be preferable in all cases so to shape his claim, rather than to sue for these disbursements "as a substantive average loss to be added cumulatively" to the subsequent total loss (*k*); but in practice it appears that no such distinction is taken, and such expenses are allowed to be recovered as an average loss, and not under the clause. (*l*)

ART. 3. Loss by Necessary Expenditures.

Extraordinary expenses incurred for the necessary repair or preservation of ship and cargo, are recoverable as a consequence of the peril that rendered them necessary.

Expenditures for the necessary repairs of ship.

§ 316. Besides these claims, other expenditures and disbursements incurred in the course of the voyage, in consequence of extraordinary casualties, and for the benefit not of the whole adventure, but of part of it, as of the ship alone, or of the cargo alone, are recoverable by the assured from the underwriter as a particular average loss, either under a special count, or, generally, as a consequence of some peril insured against.

Thus, actual disbursements *necessarily* made in a port of dis-

(j) A word of totally different meaning to salvage in the sense "*of compensation to salvors*;" as here used, the word means "*that which is ultimately saved of the property insured after notice of abandonment.*"

(k) Per Lord Ellenborough in *Livie v. Jansen*, 15 East, 655.

(l) *Le Cheminant v. Pearson*, 4 Taunt. 367. See also *Stewart v. Steele*, 5 Scott's N. R. 927.

ness for repairing damage done to the ship in the course of the voyage by the violent operation of the perils insured against, are recoverable from the underwriter under a general count alleging a loss by those perils. The only requisite is, that the repairs must be absolutely necessary to the ship's safely *keeping the sea for her voyage,¹ and that they must not fall under the head of that ordinary wear and tear of the voyage for which, as we have already seen, underwriters are not responsible.²

Losses not enumerated, but recoverable as the legal or necessary consequences of the perils insured against; as salvage — expense of necessary repairs, and other disbursements.

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In calculating, however, the amount for which the underwriter is liable in respect of repairs, a deduction is always made of *one third* for the value of the old materials. Upon the subject of this deduction, generally known in insurance law by the term of "one-third new for old," we shall have more to say in treating of the adjustment of particular average losses.³

Besides the cost of necessary repairs, there are other expenditures which may be recoverable from the underwriter.

Expenses of endeavoring to procure restoration of captured ship, fall on the underwriter.

Thus, as capture or hostile seizure, *prima facie*, dissolves the contract of affreightment, or, at all events, suspends it for a time (*m*), the wages, provisions, and other expenses of the master and crew, in endeavoring to procure a restoration of the captured ship, or the detained cargo, such expenses not being comprised within those ordinary services of the voyage which are payable out of the freight, give the assured a claim either against the underwriter on the ship, or the underwriter on the cargo, in all cases when either the ship alone, or the cargo alone, is the sole cause of seizure and detention:⁴ where the services of the master and crew are thus given for the joint benefit of both ship and cargo, as they are when both are the subject of detention, the expense incurred gives a claim to general average contribution, and only falls indirectly on the underwriters: (*n*)⁵

But an *embargo*, *detention*, or *arrest* of princes, does not

Expenses incurred during detention by *embargo*, are not a charge on the underwriters, nor during delay for repairs.

(m) The *Hiram*, 3 Rob. Ad. Rep. 189. *Liddard v. Lopez*, 10 East, 526.

(n) See *post*, General Average.

¹ *Post*, 965, et seq.

² *Post*, 979, 984.

³ *Ante*, 755, et seq.

⁴ *Watson v. Marine Ins. Co.* 7 John. 57.

⁵ *Leavenworth v. Delsfield*, 1 Caines, 573; *Penny v. N. York Ins. Co.* 3 Caines, 155; *Spafford v. Dodge*, 14 Mass. 66.

Losses not enumerated, but recoverable as the legal or necessary consequences of the perils insured against; as salvage — expense of necessary repairs, and other disbursements.

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Principle of the cases.

thus work a dissolution of the contract of affreightment, nor even suspend it, however long it may last; such a casualty, in fact, leaves the relative rights of the parties wholly untouched (*o*): the shipowner, therefore, owes all the services of his crew during this period to the freighter, and their *wages and provisions* during the detention are a charge upon *the freight, an ordinary expense of the voyage, which the shipowner, if insured, cannot recover against his underwriters. (*p*)¹

Upon the same principle it is that the wages and provisions of the crew during the ship's detention in a port of distress for repairs are not recoverable from the underwriter as an average loss, but must be borne by the shipowner, as one of the necessary expenses of earning freight. (*q*)²

The principle of all these cases is thus shortly and clearly expressed by M. Benecké:—"The owner *owes* the services of the crew to the freighter, and to the ship herself during the whole voyage, *and consequently also during the time of repairs or detention, which forms part of the voyage*, and he cannot call upon the underwriter for expenses which are foreign to his, (the underwriter's,) contract. (*r*) .

(*o*) Hadley v. Clarke, 8 T. Rep. 259.

v. Gladstone, 7 East, 33. Everth v. Smith,

(*p*) As to *ship*, see Eden v. Poole, Park

2 Maule & Sel. 278.

on Ins. 117, 8th ed. Robertson v. Ewer,

(*q*) Lateward v. Curling, Park on Ins.

1 T. Rep. 137. As to *freight*, see Sharp

288, 8th ed. Fletcher v. Poole, *ibid.* 115.

(*r*) Benecké, Pr. of Indem. 463.

¹ Martin v. Salem Ins. Co. 2 Mass. 429; M'Bride v. Marine Ins. Co. 7 John. 431; Penny v. New York Ins. Co. 3 Caines, 155; Ins. Co. of N. Amer. v. Jones, 2 Binney, 547.

² These expenses are, in the United States, all brought into general average. Post, 911, and in note. See Giles v. Eagle Ins. Co. 2 Metcalf, 140, 144.

*CHAP. III.

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OF EXCEPTED RISKS AND LOSSES.

BEFORE proceeding to consider more at large the subject of general and particular average, total and partial losses, and the doctrine of adjustment, we will advert to certain risks and losses which are excepted from the policy either by the common memorandum, or by other express stipulations of less frequent occurrence. We will divide the chapter as follows :

Sect. I. Of the Common Memorandum or Warranty to be free of Average.

Sect. II. Of the Warranty to be free of Seizure or Condemnation in the Port of Discharge, and other excepted risks.

SECT. I. *Of the Common Memorandum or Warranty to be free of Average — its Object and Form.*

§ 317. Amongst the commodities which are the subjects of marine insurance, it is obvious that there are many which are liable to be deteriorated in a much greater degree than others by the effect of the perils insured against: *e. g.* the same quantity of sea water will damage one article 50 per cent. and another only 10 per cent.; a month's delay will hardly affect one description of goods, and may entirely spoil another.

Of the common memorandum or warranty to be free of average — its object and form.

Reasons for the introduction of the memorandum clause into policies of insurance.

There are, also, many articles of a perishable nature with regard to which it is very difficult to discover how far their deterioration is owing to the direct operation of the perils of the seas, for which the underwriter would, *primâ facie*, be liable, and how far to that inherent decay and internal de-

Of the common memorandum or warranty to be free of average — its object and form.

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The policies of all states contain similar clauses.

Form of the common memorandum in use at Lloyd's.

*composition, for the effect of which, as we have already seen, he is not responsible.

In order to avoid the difficulty of adjusting the rate of premium on such commodities to the risk incurred on them, and escape being harassed with claims for partial losses alleged to have arisen from the perils insured against, but which may really be owing in great part to the inherent vice of the commodity itself, the underwriters in almost all countries where the practice of marine insurance prevails, have introduced clauses into the policy, by which they stipulate that upon certain enumerated articles *of the most perishable nature*, and of very frequent import and export, they will not be liable *for any amount of sea damage (average) short of total loss*; upon others less perishable, that they will not be liable unless the damage amounts to a certain per centage on their prime cost, or value, in the policy. (a)

The policies of all mercantile states contain stipulations, introduced with this object, which vary greatly both in respect of the articles enumerated and the amount of per centage at which the liability of the underwriter commences. (b) The stipulation in use in this country (which was first introduced about the year 1749 (c),) is generally called the *common memorandum*, and the articles enumerated in it are called *memorandum articles*. In all the policies in use at Lloyd's, it is in the following form:

- (1) Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded.
- (2) Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under 5 per cent.
- (3) And all other goods, also the ship and freight, are warranted free of average under 3 per cent., unless general, or the ship be stranded. (d)

(a) See the judgment of Lord Alvanley in *Dyson v. Rowcroft*, 3 Bos. & Pull. 478. Benecké, Pr. of Indem. 464, 465. Stevens on Average, 219, 5th ed. Boulay-Paty, Cours de Droit Mar. tit. x. sect. 18, tom. iv. p. 87, ed. 1834.

(b) See Vaucher's Guide to Marine Ins. under the titles of the different policies.

(c) 1 Magens, 10. See also *Boyfield v. Brown*, 2 Str. 1065.

(d) The Royal Exchange Assurance Company has the following memorandum: — "Free from *all* average on corn, flour, fish, salt, fruit, seeds, *hides*, and *tobacco*, unless general or *otherwise specially agreed*. Free from average on sugar, rum, skins, hemp, and flax under 5 per

*ART. 1. *Construction of the Common Memorandum.*

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§ 318. The language of this stipulation is evidently very ambiguous, and a great variety of questions have arisen as to its construction. The first question is what is included under the words by which the enumerated articles are described in the first and second clauses: as to this it has been decided in this country that the word *corn* includes malt (*e*), peas, and beans (*f*), but not rice (*g*); and that the word *salt* does not include saltpetre. (*h*)

Construction of the common memorandum.

1. What articles are included under the words of the memorandum in this country.

In the United States it has been decided that *hides and skins* do not include furs (*i*),¹ and that the specification of one description of an enumerated article, as *dried* fish, excludes all other descriptions of the same, as *pickled* fish (*j*): so, also, where the word *roots* was among the enumerated articles, it was held not to include sarsaparilla, because not liable to decay by sea damage. (*k*)²

In the United States.

cent. and on all other goods and on ship under 3 per cent. unless general." The great and important difference between this memorandum and that in use at Lloyd's, is that it omits the exception "*unless the ship be stranded*:" the other differences are, that it exempts the company from all liability for average loss on *hides and tobacco*, and enumerates *rum* as an article on which they will only be liable for damage amounting to 5 per cent. The London Assurance Company also omitted for some time the exception as to stranding, but has since reinserted it; its memorandum now runs as follows: — "Free from all average on *rice*, corn, flour, fish, salt, *saltpetre*, fruit, and seeds, except general, or the ship be stranded. Free from average on sugar, *rum*, hides, skins, hemp, flax, and tobacco, under 5 per cent.; and on all other goods the

freight and ship under 3 per cent. except general or the ship be stranded." The Alliance Marine adopts the form used in Lloyd's.

(*e*) *Moody v. Surridge*, 2 Esp. 633.

(*f*) *Mason v. Skurray*, Marshall on Ins. 225. Park, 245, 263, 8th ed.

(*g*) *Scott v. Bourdillon*, 2 Bos. & Pull. 213. Hence the word *rice* is inserted in the memorandum of the London Assurance Company.

(*h*) *Journu v. Bourdieu*, Marshall on Ins. 224. Park, 245, 8th ed. Hence also *saltpetre* is inserted by London Assurance Company.

(*i*) *† Astor v. Union Ins. Comp.* 7 Cowen Rep. 202.

(*j*) *† Backwell v. United Ins. Comp.* 2 John. Cases, 246.

(*k*) *† Coit v. Colonial Ins. Comp.* 7 John. 385.

¹ But *skins* comprehend *dog-skins*. *Bakewell v. United Ins. Co.* 2 John. Cas. 246.

² Under a policy containing the exception, usual in the Boston policies, of "other goods that are esteemed perishable in their own nature," potatoes are deemed perishable articles, and fall within the exception. *Robinson v. Commonwealth Ins. Co.* 3 Sumner, 220; *Williams v. Cole*, 16 Maine, 207. See the remarks upon this clause, in *Neilson v. Louis Ins. Co.* 5 Martin, (N. S.) 289; 2 Phil. Ins. 482. "Fruit" includes *dried prunes*. *De Pau v. Jones*, 1 Brevard, 437.

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of the common
memorandum.

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2. Meaning of
the words
"warranted free
of average."

The underwriter,
as to memorandum
articles, insures against
their total loss
only.

What amounts
to such a loss
on memorandum
articles, as
to make the underwriter
liable upon them, notwithstanding
the clause.

* The next question is, as to the meaning of the words "*warranted free of average*;" the ambiguity here chiefly arises from the use of the word *average*, as to the various meanings of which we shall have more to say elsewhere. As here used it means *partial loss by sea damage*, and the purport therefore of the words "*warranted free of average*" is that the underwriter, as to the articles enumerated in clause (1), stipulates to be free from liability for any extent of deterioration by sea damage, however great, which does not amount to a total loss. And as to the articles enumerated in clause (2), he makes the same stipulation as to all sea damage which does not amount to 5 per cent. of their prime cost, or insured value: it being understood in both cases that, if the loss be total, he engages to pay the full amount. (l)

In point of fact, therefore, an insurance upon the articles warranted free of average in clause (1), is equivalent to an insurance against *their total loss only*,¹ according to the meaning of that term as explained in the chapter which treats of it. (m) In most of the cases, accordingly, in which a question has been made as to the liability of the underwriter for loss on memorandum articles, the point of decision has been the totality or otherwise of the loss; and for this reason it has appeared better to postpone the detailed consideration of the cases until we come to treat of the doctrine of total loss, contenting ourselves here with laying down the following positions as the result of the authorities.

The underwriter is liable (as for a total loss) on memorandum articles: 1. When they are wholly destroyed, as by fire, or sunk to the bottom of the sea without hope of recovery, or otherwise irretrievably lost to him. 2. When by reason of sea damage, they are reduced, in the course of the voyage, to such a state of decomposition that they are obliged to be thrown overboard, or otherwise dis-

(l) Per Lord Alvanley in *Dyson v. Rowcroft*, 3 Bos. & Pull. 476.

(m) See *post*, Chap. VII.

¹ 3 Kent, (5th ed.) 295, 296; *Magrath v. Church*, 1 Caines, Rep. 196; *Neilson v. Columbian Ins. Co.* 3 Caines, Rep. 108; *Saltus v. Ocean Ins. Co.* 14 John. 138; *Marcadier v. Chesapeake Ins. Co.* 8 Cranch, 39; *Moreau v. United States Ins. Co.* 1 Wheaton, 219; *Skinner v. Western M. & F. Ins. Co.* 19 Louis. Rep. 273.

posed of at some intermediate port. (n)¹ 3. When having *been necessarily landed at a port of repairs they are there sold, because so deteriorated by sea damage that, if sent on to their port of destination, they could only arrive there in a state of physical annihilation: and this, though at the time of sale they may subsist in specie, and fetch a price as and for what they are described as being in the policy. (o)² 4. If they arrive at their port of destination in bulk, but so decomposed by sea damage as to have undergone a chemical change, and no longer to retain the same physical character, it is doubtful whether this would be considered as a total loss, so as to render the underwriter liable notwithstanding the warranty. 5. It is, however, quite certain that no amount of mere *deterioration* by sea damage, however great, which does not thus annihilate the physical and distinctive character of the goods, will render the underwriter liable, especially where they arrive in bulk at their port of destination. (p) 6. In this country, when a cargo or part of a cargo of memorandum articles is made up of *several distinct packages, each capable of a distinct valuation*, and any one of these be entirely lost, the underwriters are liable to the full value of the package so lost, this being considered a *total loss* of such *part*. (q)³ But, in order to this, each package must be literally and entirely lost or destroyed in bulk: if its contents be only deteriorated, or in great part washed out by sea water, whatever the extent of the depreciation may be, the rule does not apply, and the underwriter is not liable. (r) It

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of the common
memorandum.

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Cases of actual total loss.

Actual total
loss of part.

(n) *Dyson v. Rowcroft* 3 Bos. & Pull. 474. *Colegan v. London Ass. Comp.* 5 Maule & Sel. 447. *Parry v. Aberdeen*, 9 B. & Cr. 411, overruling *Cocking v. Fraser*, Park on Ins. 247, 8th ed. 4 Dougl. 295.

(o) *Roux v. Salvador*, 3 Bingh. N. C. 303. 4 Scott, 1; overruling to this extent, S. C. 1 Bingh. N. C. 524. 1 Scott, 491.

(p) *Where the goods have arrived*, see *McAndrews v. Vaughan*, Marshall on Ins. 219. Park, 222, 8th ed. Mason v. Skur-

ray, Marshall on Ins. 218. Park, 253, 8th ed. *Glennie v. London Ass. Comp.* 2 Maule & Sel. 371. *Where loss takes place before arrival*,—*Anderson v. Royal Exch. Comp.* 7 East, 58. *Thompson v. Royal Exch. Comp.* 16 East, 214. *Hedburg v. Pearson*, 7 Taunt. 153.

(q) *Davy v. Milford*, 15 East, 509.

(r) *Thompson v. Royal Exch. Ass. Comp.* 16 East, 214. *Hedburg v. Pearson*, 7 Taunt. 153.

¹ See *Hugg v. Augusta Ins. & Banking Co.* 7 Howard, (U. S.) 595, 604.

² See *Hugg v. Augusta Ins. & Banking Co.* 7 Howard, (U. S.) 595.

³ See post, 1038, 1041, and notes.

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of the common
memorandum.

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Cases of con-
structive total
loss.

3. Meaning of
the words "*un-
less general.*"

is, moreover, to be borne in mind, that the rule does not apply at all to commodities shipped in bulk and insured in gross, as to which there can be no total loss of part. (s)

*In the United States this whole doctrine of the total loss of part is exploded, and the construction of the memorandum settled to be that, unless there be a total loss of the whole species (as of all the *corn*, or all the *sugars* on board,) the underwriter is not liable, whether the articles be shipped in bulk, or in several distinct packages. (t) 7. In the cases hitherto considered, the losses which have been held to render the underwriter on memorandum articles liable in spite of the warranty, have been actual total losses; *i. e.* losses total in their own nature, independently of the election of the assured to treat them as such, and therefore requiring no notice of abandonment (u); there is, however, no doubt that a constructive total loss on memorandum articles, *i. e.* such a state of things as would entitle the assured, on giving notice of abandonment, to claim the full amount of the insurance, would render the underwriter liable, notwithstanding the memorandum. (v) The interest, indeed, which the assured in these cases has to convert a partial into a total loss, may be a fair argument to a jury upon a doubtful question of fact, as to the *nature of the loss or the motive for an abandonment*; but the question, whether the loss be partial or total in its nature, must depend on general principles. The memorandum does not vary the rules upon which a loss shall be partial or total; *it does no more than preclude the indemnity for an ascertained partial loss, except upon certain conditions.* (w) ¹

The next question is as to the meaning of the words "*unless general.*" It was on one occasion contended, that these words amounted to a condition that if a general average loss took place, then the underwriters were liable for partial loss also; but this, as might have been expected, was held not

(s) *Hills v. London Ass. Comp.* 5 Mees. & Wels. 569.

(t) *† Wardsworth v. Pacific Ins. Comp.* 4 Wendell 33.

(u) As to this, see Chapter VII. *post.*

(v) For cases of *constructive total loss*

on memorandum articles, see Chapter VIII. Sect. 3. Constructive Total loss on Goods.

(w) Per Lord Abinger in *Roux v. Salvador*, 3 Bingh. N. C. 277, 278.

¹ See *Pool v. Protection Ins. Co.* 14 Conn. 47.

to be so, and it was decided that the true construction of the words "warranted free of average *unless general*," was that *the underwriter is exempted by the memorandum from liability for any thing less than a total loss, except it be of the nature of general average; but that for general average losses he is in all cases liable. (x)

Construction of the common memorandum.

* 857

As to the meaning of general average in the clause warranting the underwriter free from damage on the ship under 3 per cent., it seems now to be settled, that *if a ship in ballast* (i. e. with no cargo on board) cut her cable, or voluntarily incur any damage in the nature of general average, the underwriters shall be liable for this as "general average," although the damage done does not amount to 3 per cent.; and this, although there is only one subject at risk at the time the sacrifice is made, and there can, of course, be no contribution. (y)

Next, as to the words, "*or the ship be stranded*," these words, it has been decided after much previous controversy, must be read as though the whole clause ran "warranted free of average unless general, or *unless* the ship be stranded;" that is, if the ship be stranded the underwriters agree to be responsible for any loss by sea damage on the enumerated articles, however trifling the extent of deterioration may be, just as though no warranty to be free of average had been inserted in the policy. (z)

4. Meaning of the words "*or the ship be stranded*."

The reason of this is, that, as it is very difficult to ascertain, in the case of stranding, whether the damaged state of the memorandum articles arose proximately from the stranding, or from the perishable nature of the commodities themselves, the parties, in order to avoid the difficulty of this inquiry, agree to consider the loss to have happened in consequence of the stranding (which is a peril insured against), and to be solely referable thereto. (a)

Reason of introducing them.

* 858

* It has also been decided that the underwriters are thus liable, though the damage or deterioration in respect of which

To give effect to these words it need not be shown that the loss arose from the stranding. *Burnett v. Kensington*, 7 T. Rep. 210.

(x) *Wilson v. Smith*, 3 Burr. 1550.

(y) *Stevens on Average*, 229, 5th ed. *Benecke*, Pr. of Indem. 473. The practice in the United States is the same. 2 *Phillips on Ins.* 503.

(z) *Burnett v. Kensington*, 7 T. Rep. 210, confirming *Castillon v. London Ass.*

Comp. cited 2 Burr. 1553, and *Browning v. Elmslie*, cited 7 T. Rep. 216, and 4 T. Rep. 783, and overruling, as to this point, *Wilson v. Smith*, 3 Burr. 1550.

(a) Per Lord Kenyon in *Nesbitt v. Lushington*, 4 T. Rep. 783; in *Burnett v. Kensington*, 7 T. Rep. 222, 224.

Construction
of the common
memorandum.

the claim is made be shown to have proceeded, not from the stranding itself, but from some other peril; thus, in the leading case of *Burnett v. Kensington* the facts were, that the ship, having sprung a leak by striking on a rock, was making so much water, that the captain, for the general safety, was obliged to run her on shore; — the cargo, which was fruit, “warranted free of average,” was greatly damaged, but it was expressly found that the whole damage was caused by the leak, and none by the subsequent stranding — the court, after two arguments and the most mature deliberation, held the underwriters liable for the average loss on the cargo, notwithstanding the memorandum. (b) The reason that mainly influenced the court in their decision was, that, by determining that the assured could only recover for the loss that happened by the stranding, they would introduce all the doubt and difficulty as to the causes of the loss which the introduction of the exception “*unless stranded*” into the memorandum was calculated to produce. (c)

Though the
stranding take
place in one
part of the voy-
age, and the
average loss in
another, still
the underwriter
is liable.

In this case of *Burnett v. Kensington*, it will be observed, that the stranding, though subsequent in point of time, was yet in some degree connected with, in fact, was necessitated by, the very peril that caused the damage to the cargo: it has been made a question in the United States, whether the underwriter is liable, if the stranding take place in one part of the voyage, and the cargo be not damaged until a subsequent part of it, by a cause wholly unconnected with the stranding. (d) This, however, is a point on which no doubt can, I apprehend, be entertained in English law, it being distinctly admitted by Mr. Justice Grose as a consequence clearly following from the decision of the court in *Burnett v. Kensington*, “that, if a ship be stranded and the cargo suffers no damage whatever, and afterwards the ship meets with bad weather, and the *cargo sustains an average loss of 90 per cent. the underwriters are answerable for the whole of that average loss,” though no part may have happened in consequence of the previous stranding. (e)

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Where, however, the stranding takes place after the memorandum articles have ceased to be at risk, (as where they

(b) *Burnett v. Kensington*, 7 T. Rep. 210.

(d) 2 Phillips on Ins. 476.

(c) See per Grose, J. 7 T. Rep. 224.

(e) Per Grose, J. in *Burnett v. Kensington*, 7 T. Rep. 223, 224.

were landed and sold at *Rio* in the course of the voyage, and the stranding took place off *Bordeaux*, the port of destination,) this does not render the underwriter liable for an average loss sustained by them in the course of the voyage; for the stranding contemplated by the memorandum must be one which takes place after the adventure on the memorandum articles has commenced, and before it has terminated. (*f*)

Construction of the common memorandum.

After, where the stranding takes place after the memorandum articles have ceased to be at risk.

It has also been decided, that the words "or the ship be stranded," are exclusively confined to the stranding of the ship, and that the stranding of a *lighter*, in which goods are being conveyed from the ship to shore, is not within the exception. (*g*)

The only stranding which can make the underwriter liable, is a stranding of the ship.

The meaning of the memorandum, therefore, is —

General meaning of the whole memorandum.

1. That all losses, in the nature of general average, are to be paid by the underwriter as though the policy did not contain the memorandum :

2. That the underwriter is liable for no particular average losses, or for none under the rates specified, unless the ship be stranded :

3. But that if the ship be stranded while the memorandum articles are on board, then the underwriter is liable to pay all particular average losses, whether caused by the stranding or not, just as though the memorandum did not exist.

It is obviously, therefore, of great importance to ascertain when a ship is considered "*to be stranded*," within the meaning of the memorandum.

*ART. 2. *What is a Stranding within the Meaning of the Memorandum.*

* 860

§ 319. The term stranding is very badly chosen, and has given rise to a variety of decisions which, in the language of Lord Ellenborough, "display a curiosity not at all creditable to the law." (*h*)

What is a stranding within the memorandum.

The term stranding is badly chosen.

The following appear to be the principal points determined

(*f*) *Roux v. Salvador*, 1 Bingh. N. C. 336. 1 Scott, 491. See remarks of Lord Abinger on same case in error, 3 Bingh. N. C. 276.

(*g*) *Hoffman v. Marshall*, 2 Bingh. N. C. 363. 2 Scott, 504.

(*h*) Per Lord Ellenborough in *M'Douglass*

v. Royal Exch. Ass. Comp. 4 Camp. 294. See S. C. 4 Maule & Sel. 503, and also as reported by Mr. Stevens, *Essay on Average*, 248, 249, 5th ed. See also *M'Culloch's Comm. Dict. tit. Insurance*, 700, ed. 1837.

What is a stranding within the memorandum.

1. In order to constitute a stranding there must be a *settling* of the ship for a time on the obstructing object; if it is merely "*touch and go*," with the ship, it is no stranding.

Dobson v. Bolton, Park on Ins. 239, 8th ed.

Harman v. Vaux, 3 Camp. 430.

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Baker v. Towry, 1 Stark. 436.

M'Dougle v. Royal Exch. Ass. Comp. 4 Camp. 283. 4 M. & Sel. 503.

as to what constitutes a stranding within the meaning of the memorandum :

1. If, as Lord Ellenborough says (i), "it be merely *touch and go*" with the ship, — if, that is, she merely touches on the obstructing object (whether rock, bank, reef, or of whatever other nature) without remaining fixed upon it for some space of time, that will not constitute a stranding; if, on the other hand, she settles down on it in a quiescent state, it will. (j) The amount of damage sustained by the ship has nothing to do with the question of stranding or no stranding. (k)

Thus, where a ship ran aground on some piles, placed in a river bed about nine yards from the shore, in order to keep up the banks, *and there rested till* they were cut away, this was held to be a stranding. (l)

A ship was proceeding down a tide river when the wind suddenly took her ahead, and she went ashore stern foremost *on the mud bank of the river*. There she remained fast for about two hours, till the tide flowed, when she got off and proceeded on her voyage; *it was not found that she had sustained any injury*. Lord Ellenborough held that this was **a stranding*, he says, "It is not merely touching the ground that constitutes stranding. If the ship *touches and runs*, that circumstance is not to be regarded. *There she is never in a quiescent state; but if she is forced ashore, or driven on a bank, and remains for any time on the ground, this is a stranding, without reference to the degree of damage she may thereby sustain.*" (m) So, where a ship was driven by a current on a rock, and remained fixed there from *fifteen to twenty minutes*, it was held a stranding. (n)

But, where a ship coming out of a harbor struck on a rock, fell over on her beam ends, and after remaining so for a *minute and a half* floated off and proceeded on her voyage, Lord Ellenborough held that this was no stranding: "To use a vulgar phrase which has been applied to this subject, if it

(i) 4 Camp. 283.

(j) Dobson v. Bolton, Park on Ins. 239, 8th ed. S. C. Bolton v. Dobson, Marsh. Ins. 231. Harman v. Vaux, 3 Camp. 430. Baker v. Towry, 1 Stark. 436. M'Dougle v. Royal Exch. Ass. Comp. 4 Camp. 283.

(k) Harman v. Vaux, 3 Camp. 430.

(l) Dobson v. Bolton, Park on Ins. 239, 8th ed. Marshall on Ins. 231. 2 Phillips on Ins. 468.

(m) Harman v. Vaux, 3 Camp. 430.

(n) Baker v. Towry, 1 Stark. 436.

is "touch and go" with the ship there is no stranding. It cannot be enough that the ship lay for a few moments on her beam ends. Every striking must necessarily produce a retardation of the ship's motion. *If by the force of the element she is run aground and becomes stationary, it is immaterial whether this be on piles or on rocks on the sea shore ; but a mere striking will not do, wheresoever that may happen.*" (o) When the case came before the full court, his lordship said, "I take it that stranding in its fair legal sense implies a *settling of the ship* — some resting or interruption of the voyage, so that the ship may *pro tempore* be considered as wrecked ; from which misfortunes a great deal of damage does frequently occur." (p)¹

What is a stranding within the memorandum.

In the case of *Baring v. Henkle*, A. D. 1801 (q), Lord Kenyon held that a ship in a tide river which was fouled and driven on a bank, *where she remained an hour*, was not stranded. This decision, which is inconsistent with the later authorities, is said by Taunton, J. (r) to be exceedingly doubtful in law, and may, in fact, be considered as overruled.

*2. Another important test is to ascertain whether the ship took the ground in the ordinary course of the navigation, or in consequence of some unusual and unexpected casualty.

* 862

"Where a vessel takes the ground in the ordinary and usual course of navigation and management in a tide river or harbour, upon the ebbing of the tide, or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered a stranding within the memorandum." (s)²

2. Where the ship takes the ground in the ordinary course of the navigation, as by the ebbing of the tide, this is not a stranding.

A vessel, under the care of a pilot, while being taken up Cork river, twice took ground from shallowness of water, and remained aground, on the first occasion eight, and on the second occasion ten, hours. She was each time floated

Hearne v. Edmunds, 1 Br. & Bingh. 398.

(o) *M'Dougle v. Royal Exch. Ass.* (4), 8th ed. Marshall, 232. 2 Phillips on Comp. 4 Camp. 283. S. C. 4 Maule & Ins. 468. Sel. 503.

(r) In 3 B. & Ad. 27.

(p) 4 Maule & Sel. 585.

(s) Per Lord Tenterden in *Wells v.*

(q) *Baring v. Henkle*, Park, 239, note Hopwood, 3 B. & Ad. 34.

¹ *Lake v. Columbian Ins. Co.* 13 Ohio, 18. If a vessel strike and bidge, but pass on without stopping, it is not a stranding. ib.

² See per Story, J. in *Potter v. Suffolk Ins. Co.* 2 Sumner, 203.

What is a stranding within the memorandum.

off by the tide, and afterwards-at high water was moored to a quay in Cork harbor: on the tide ebbing she fell over on her side, and lay on her broadside for two whole tides, by which the ship and cargo (which was warranted free of average) were much damaged. *Taking the ground in the manner mentioned appeared in evidence to be no more than was usual with all vessels of the same class in the Cork river.* This was held not to be a stranding within the memorandum, because it happened in the ordinary course of the navigation. (t)

Kingsford v. Marshall,
8 Bingh. 458.

So, where a vessel entered a tide harbor, and was moored in the very place indicated by the harbor-master, and, upon the tide ebbing, took the ground in the precise spot where it was intended she should, and, in so doing, struck on some hard substance, whereby her bottom was damaged, this was held not to be a stranding, but a mere taking the ground in the ordinary course of the navigation. (u)

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Chief J. Tindal thus gives the reason of this class of cases: "It is perfectly clear that, by the term stranding, neither of the contracting parties could intend a taking of *the ground by the ship in the ordinary course of navigation used in the voyage upon which she was engaged; otherwise, at every ebb of the tide there would be a stranding; and the memorandum intended for the security of the underwriters against partial losses upon perishable commodities, would be altogether nugatory, as the smallest injury to the cargo, occasioned at an early part of the voyage, would always be a loss within the policy, by reason of the ship discharging her cargo in a tide river or harbor." (v)

But where the ground is taken by reason of some accidental occurrence or extraneous cause, that is a stranding.

3. "But where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event is a stranding within the meaning of the memorandum" (w); or, as Chief J. Tindal expresses it, "*where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which the*

(t) *Hearne v. Edmunds*, 1 Brod. & Bingh. 388. 4 Moore 15.

to the same effect the observations of Parke, J. in 3 B. & Ad. 29.

(u) *Kingsford v. Marshall*, 8 Bingh. 458. 1 Moore & Sc. 667.

(w) Per Lord Tenterden, 3 B. & Ad. 34.

(v) Per Tindal, C. J. 8 Bingh. 463. See

ship is engaged, either wholly or in part, but from some accidental or extraneous cause, that is a stranding." (x) ¹

What is a stranding with in the memorandum.

A pilot, contrary to the warning of the captain, and in his absence, fastened a ship by a rope to the pier of the St. George's dock basin, where the dock master told him she would not lie safely. Soon afterwards the ship took ground astern, and the tide ebbing, the rope broke, and she fell over on her side, and was much damaged. The court held that this was clearly a stranding, the ship having been taken out of the usual course, and improperly moored in the place where the accident afterwards happened. (y)

Carruthers v. Sydebotham, 4 M. & Sel. 77.

A ship being in Wisbeach river; (which is an artificial inland navigation,) it became necessary to draw off the water; upon the water's sinking, the ship accidentally settled down on some piles which were not previously known to be there. This was held to be a stranding, the event not being in the *ordinary course of the navigation; for "we cannot suppose," says Abbot, C. J., "that these canals are so constantly wanting repair as to make the drawing off the water an occurrence in the ordinary course of the voyage." (z)

Rayner v. Godmond, 5 B. & Ald. 225.

* 864

A ship, on entering a tide harbor, struck the fluke of an anchor, and being afterwards moored in deep water was found to be in danger of sinking. For this reason she was warped further up the harbor, where she took ground and remained fast. This was held to be a stranding, for, as remarked by Mr. J. Bayley, "the ship, in this case was laid on the strand, not in ordinary course of navigation, but *ex necessitate* to avoid an impending danger." (a)

Barrow v. Bell, 4 B. & A. 736.

A ship was obliged to put into a tide harbor, which was dry at every tide, and was there moored alongside a quay, where ships of her burden generally lay: in addition to the usual moorings, it was found necessary to lash her by a rope fastened round her masts to posts on the shore; when the tide ebbed this rope, not being of sufficient strength, broke;

Bishop v. Pentland, 7 B. & C. 219.

(x) 8 Bingh. 464.

(z) Rayner v. Godmond, 5 B. & Ald.

(y) Carruthers v. Sydebotham, 4 Maule

225.

& Sel. 77; and see the observations of (a) Barrow v. Bell, 4 B. & Cr. 736. Taunt. J. on this case, in 3 B. & Ad. 25. S. C. 7 Dowl. & Ry. 244.

What is a stranding within the memorandum.

on which she fell over on her side and was stowed in. This was held to be a stranding: the falling over having taken place, not in the ordinary course of the voyage, but in consequence of an unforeseen accident, viz., the breaking of the rope. (b)

Wells v. Hopwood, 3 B. & Ad. 20.

A ship put into a tide harbor, and proceeded to discharge her cargo at a quay on the west side of it, having her head moored by a rope to the opposite, or eastern side of the harbor. The wind blowing from the East, this rope became stretched, so that the ship advanced nearer to the western quay; and, in consequence, the forepart of the ship, instead of settling in the mud, as was intended, got upon a heap of rubbish, whereby, as the tide ebbed, she became strained, and let water through her seams, thus damaging a cargo of fruit warranted free of average. It was held by the majority of the judges, that this was a stranding within the memorandum. (c) Taunton, J. in the course of his judgment, said that this case was not distinguishable from *Bishop v. Pentland* (the case last cited): "here it is found," says the learned judge, "that the wind blowing from the East towards the bank, and causing a strain on the rope, the ship in consequence had changed her position, and got nearer the quay with her forefoot on the bank, so that here there was a change of the position of the ship, and a stranding, by her forefoot being on the bank, and *this partly, if not wholly caused by the easterly wind*. This, I think, was an accidental circumstance, not necessarily incident to the navigation." (d)¹

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(b) *Bishop v. Pentland*, 7 B. & Cr. 219. Lord Tenterden, Littleale, and Taunton, 1 Man. & Ry. 49. were the majority.

(c) *Wells v. Hopwood*, 3 B. & Ad. 20. (d) 3 B. & Ad. 26.

¹ Bilging, as well as stranding, is introduced into some American policies as a circumstance defeating the memorandum in respect to losses caused thereby, which gives rise to the question, what is *bilging*? Under a policy exempting the underwriters from "partial loss on salt, grain, &c., and other goods esteemed perishable," except "the damage happens by stranding or bilging," the ship, loaded with a cargo coming within the memorandum, was thrown on her beam ends, whereby the seams were opened and water admitted, by which the cargo was damaged. But no plank or timber was broken. It was held that this was not *bilging*. *Ellery v. Merchants Ins. Co.* 3 Pick. 46.

ART. 3. *Construction of the Clauses warranted free of Average under 5 per Cent., and warranted free of Average under 3 per Cent.*

§ 320. The object of both these clauses is the same, viz. *to protect the Underwriter against trifling claims*: the former comprising articles more liable to sea damage than the general cargo, though not so perishable as those which, in the first clause, are warranted free of all average, stipulates that, with respect to them, the underwriter shall not be liable, unless the loss amounts to 5 per cent.: the latter clause provides that, with regard to the general cargo, the ship and freight, he shall not be liable, unless the loss amounts to 3 per cent. (e)

Upon the *construction* of these clauses many questions have arisen, which may, however, all be comprised under two general heads, viz. 1. How is the required amount of loss to be made up in itself? 2. Upon what value is it to be calculated?

*(1) The first question that presents itself under the first head is this, *can successive losses, happening at different times, be added together so as to make the underwriter liable if their aggregate amount exceeds 5 per cent. or 3 per cent.?*

With regard to *freight and goods*, there never has been any doubt that the true rule is to take the aggregate amount of the whole damage occasioned in the course of the voyage; on the ground, that until the end of the voyage it is impossible to estimate the real amount of damage done to the cargo. (f)¹

It has recently been decided, both in this country and in the United States, that the rule is the same with regard to

Construction of the clauses warranted free of average under 5 per cent. and warranted free of average under 3 per cent.

Object of these clauses.

I. How the required percentage of loss is to be made up.

* 866

(1.) Successive losses happening at different parts of voyage may be added together to make up the required amount.

(e) The articles specified in the 5 per cent. clause are generally called, together with those in the first clause, *enumerated articles*; the "*other goods*" included generally in the 3 per cent. clause, are called the *non-enumerated articles*.
(f) Benecké, Pr. of Indem. 473. Stevens on Average, 228, 5th ed.

¹ Donnell v. Columbian Ins. Co. 2 Sumner, 366; Brooks v. Oriental Ins. Co. 7 Pick. 250, 267.

Construction of the clauses warranted free of average under 5 per cent. and warranted free of average under 3 per cent.

(2.) General and particular average cannot be added together to make up the amount.

(3.) Expenses incurred in saving or preserving cargo cannot be added to the average to make up the required amount.

the *ship* also, so that if the aggregate of successive losses exceeds 3 per cent. the underwriter on ship is liable. (g) ¹

(2) A *second* rule is, that general and particular average cannot be added together so as to make the underwriter liable if their aggregate amount exceeds the requisite percentage. (h)

But with regard to those losses already mentioned, which are in the nature of general average, because voluntarily incurred, but not the subjects of general average contribution, because incurred for the benefit of the ship only, the underwriter on ship is liable, although they do not amount to 3 per cent. (i)

(3) A third rule is, that *expenses incurred for saving or preserving the cargo and freight* (such as warehouse rent in an intermediate port, and expenses of unloading and reloading) *cannot be added to the damage, in order to make it up to the required amount* (j); for, as Mr. Stevens says, these expenses are not of the nature of a *loss*, but are *charges* incurred to preserve and bring forward the property: the clause only contemplates a loss, and that such loss should **arise from an accident*. (k) If, however, the loss, independently of these charges, exceeds the limited amount of percentage, these charges themselves must be paid by the underwriter, whether they amount to 3 per cent. or not. (l)

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(g) Blackett v. Royal Exch. Comp. 2 Benecké, Pr. of Indem. 473. 2 Phillips C. & J. 244. † Donnell v. Columbian Ins. on Ins. 503.

Co. 2 Sumner, 366, per Mr. J. Story. (j) Stevens, 230, 5th ed. Benecké

(h) Stevens on Average, 232, 5th ed. 472.

Benecké, Pr. of Indem. 472. 2 Phillips (k) Stevens, 230, 5th ed.

on Ins. 499. (l) Benecké, 472 2 Phillips on Ins.

(i) Stevens on Average, 229, 5th ed. 498, 499.

¹ In Brooks v. Oriental Ins. Co. 7 Pick. 259, it was decided, that, where a vessel sustained a damage in a gale, and several months afterwards another damage by running foul of another vessel, these two distinct losses could not be joined together to make up the five per cent. See the remarks on this case in Donnell v. Columbian Ins. Co. 2 Sumner, 366, 377, 378. By the Boston policies of insurance no partial loss on a ship under five per cent. is to be borne by the underwriters. Assuming that a loss, sustained by the ship insured, by means of an accidental collision with a foreign vessel, which by the law of the country where it takes place, is to be borne and apportioned between the vessels, as being by inevitable casualty, must be taken to be a partial loss, and amounts to less than five per cent.; yet if the sum apportioned upon her, on account of the injury to the other vessel, together with her own loss, exceeds five per cent., the underwriters are liable for the whole loss borne and apportioned on her. Peters v. Warren Ins. Co. 1 Story, C. C. 463.

(4) Fourthly, it is a rule, that the *expenses of ascertaining the amount of the loss cannot be added to the damage* to make up the required percentage (*m*):¹ but if the damage *per se* exceeds the required amount, then these charges are added to it and paid by the underwriter; otherwise they are paid by the assured: the rule being that they should *fall on the party who must have sustained the loss had its amount been ascertained without any expense.*

Construction of the clauses warranted free of average under 5 per cent. and warranted free of average under 3 per cent.

(4.) Nor the expenses of ascertaining the amount of loss.

§ 321. The second question is upon what amount is the percentage to be calculated: (1) First, it is a rule that the exception is limited in its application *to the amount at risk under the policy at the time of loss, i. e.,* if it amounts to 5 per cent. or 3 per cent. on the interest *then* on board it is sufficient, though it may not amount to 5 or 3 per cent. on the interest subsequently at risk under the policy. This is established by a very revolting instance. In a policy on a slave ship the slaves were warranted "free of average under 5 per cent. for loss from insurrection:" An insurrection took place at a time when there were only forty-nine slaves on board; seven were killed in suppressing it: It was held that the underwriters were liable, this being a loss exceeding 5 per cent. of the number on board when it took place, though it was by no means 5 per cent. of the number that ultimately formed the complete cargo. (*n*)²

II. How the percentage is to be calculated.

(1.) On the amount at risk at the time of loss.

(2.) Upon the articles enumerated in the 5 per cent. clause when insured in gross, (as it is often the case with hides, flax, hemp, &c.) the proportion of damage is calculated upon the whole amount of each specified article *taken separately, i. e.* the construction of the memorandum is the same as if it were *worded "sugar free of average under 5 per cent., tobacco free of average under 5 per cent., hemp free of average under 5 per cent., and so on with the rest of the enumerated articles. Thus, if flax and hemp be insured together, valued at

(2.) When insured in gross the percentage is calculated on the whole quantity of each enumerated article on board.

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(m) *Benecké, Pr. of Indem.* 474. 2 (n) *Rohl v. Parr*, 1 Esp. 445. *Phillips on Ins.* 509.

¹ See *Brooks v. Oriental Ins. Co.* 7 Pick. 259, 270.

² *S. P. Maryland Ins. Co. v. Bosley*, 9 Gbl & John. 337.

Construction of the clauses warranted free of average under 5 per cent. and warranted free of average under 3 per cent.

(3.) And on all other goods, when shipped in bulk, it is calculated on the whole cargo: *aliter* when each class of commodities is separately valued.

(4.) Where merely shipped in separate packages, without separate valuation, and without any clause as to paying average on each package, &c. the percentage of loss is calculated on the whole.

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1000*l.*: let the aggregate amount of damage upon both articles be 100*l.*, i. e. 10 per cent. on their whole value taken jointly; yet, unless the damage on each amounts to 5 per cent. of its value taken separately, the claim can be made good only on the one on which it exceeds that amount. (o)

(3.) Where, however, as in the 3 per cent. clause, the rest of the cargo, under the general term "*all other goods*," is warranted free of average, without any specific enumeration of distinct classes, it is obvious that the same rule cannot apply: accordingly the practice is to regard the whole of the non-enumerated articles as forming together *one mass of property*, and then to calculate the percentage of damage on their aggregate value (p); unless, indeed, the non-enumerated articles have been separately valued in the policy: for then, such separate valuation gives a distinct basis on which to compute the damage, as, e. g. if coffee is valued at 300*l.* and tea at 3000*l.* the amount of damage on the coffee must amount to 9*l.* and on the tea to 90*l.* in order to make the underwriter liable: if it were 11*l.* on the coffee, and 89*l.* on the tea, he would be liable on the former only, and not on the latter. (q)

(4.) Where, however, large quantities of *the same description* of articles, *whether enumerated or unenumerated*, are made up in separate packages, the damage must amount to 5 per cent. or 3 per cent. of the whole aggregate of packages of the same class of goods, and cannot be calculated upon each separate package.

Thus, suppose 101 hogsheads of sugar, or 101 bags of coffee, to be insured free of average, the former under 5 per cent. the latter under 3 per cent.: suppose, further, five of the *hogsheads. or three of the bags, to be so damaged as wholly unfit for use, the underwriter, upon the *strict* construction of the memorandum, would clearly not be liable. (r) Of course, if the five hogsheads, or the three bags, be totally washed out, or go to the bottom of the sea, the assured, since *Davy v.*

(o) Stevens on Average, 223, 5th ed. Conn. Rep. 357, there cited. { Insa. Co. v. Bland, 9 Dana, 143. }

(p) 2 Phillips on Ins. 506.

(r) 1 Magens, 73. Stevens, 224, 5th ed.

(g) 2 Phillips on Ins. 506, and the case Benecké, 474.

of † Ocean Ins. Comp. v. Carrington, 3

Milford, would, in this country, be entitled to recover their full value as for a total loss of part; but not as a particular average loss.

(5) It is obvious that this mode of estimation must in many cases be unfavorable to the assured: in order, therefore, to protect himself and render the underwriter liable, where otherwise, on the strict construction of the memorandum he could not be so, certain stipulations have been introduced into the policy *on behalf of the assured*, as *e. g.* "*to pay average on each species, as though separate interests separately insured:*" "*To pay average on ten, fifteen, or twenty hogsheads, succeeding numbers, as if &c.*" as before. If there are no numbers, in such case the practice is to disregard the clause entirely, and to pay the average only if it amount to the stipulated percentage on the whole quantity. (s) To meet the case where manufactured goods are shipped in bales or packages, the general clause inserted is, "*To pay average on each package, as if separate interests separately insured.*" (t)

Construction of the clauses warranted free of average under 5 per cent. and warranted free of average under 3 per cent.

(5.) Clauses that are inserted in practice, to avoid this mode of calculating the percentage.

The effect of these clauses is to make the underwriter liable in many cases where he would have escaped from liability altogether upon the strict construction of the usual printed clauses.

Thus, let 1000*l.* be insured on ten cases of manufactured goods valued at 100*l.* each case, "*To pay average on each package as of separate interests separately insured:*" suppose five of the cases to be damaged each 3 per cent. or 15*l.* in the whole: then compensation may be claimed from the *underwriters, though, without the clause, the loss must have amounted to 50*l.* in order to make them liable. (u)

Effect of these clauses.

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If the damage exceeds the required per centage on the whole amount, the assured may, at his option, calculate the percentage either on the whole amount or on the damaged packages.

Where damage exceeds the required percentage on the whole amount as well as on the separate lots.

Thus, supposing, on the same data, one of the cases to have been damaged 50 per cent. or 50*l.* and the rest to arrive damaged only 1 per cent. the assured may recover the amount of damage on the nine cases, though under the required per centage, because the whole damage exceeds 5 per

(s) Benecké, *Pr. of Indem.* 478, and see note, *ibid.*

(t) Stevens, 220, 5th ed.

(u) Stevens on *Average*, 226, 5th ed.

Construction of the clauses warranted free of average under 5 per cent. and warranted free of average under 3 per cent.

Liberal construction where these clauses are not inserted.

The premium and costs of insurance are included in the value on which the percentage of loss is to be calculated.

If the percentage exceeds the required amount, the underwriter is liable for the whole amount of loss, and not merely for the surplus.

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cent. on the whole value. The reason is, that this clause, having been introduced for the benefit of the assured, must be construed in his favor. (v)

Mr. Stevens says that the insertion of these clauses is so much a matter of general usage whenever goods are insured direct from their place of growth or manufacture, that, even when omitted, the policy is acted upon as though they had been introduced. (w)

It has been decided in the United States that, in order to calculate whether the percentage of loss amounts to 5 or 3 per cent. on the insurable value of the goods, the premium is to be deducted from that value (x):¹ but no such principle appears to be acted upon in this country; on the contrary, the rule here is that the underwriter is liable whenever the loss (under the limitations already pointed out) amounts to 5 per cent. or 3 per cent. on the value in the policy, or on the prime cost *plus* the premium and other costs of insurance.

It appears to have been the intention of those by whom the clause was first introduced, that the *surplus* only of loss above the 5l or 3l. per cent. should be paid by the underwriter: the practice, however, in this country, has uniformly been that, when the loss exceeds the excepted amount of *percentage, the underwriter is liable for the full amount of the loss, and not only for the surplus. (y)

SECT. II. *Warranties to be free of Seizure and Confiscation in Port of Discharge, and other excepted Risks.*

Warranties to be free of seizure and confiscation in port of discharge, and other excepted risks.

Warranty to be free of seizure in ships.

§ 322. During the last war, when almost all the ports of the Baltic were in a state of occasional hostility to this country, and the adventurous expeditions to those seas were under-

(v) *Hagedorn v. Whitmore*, 1 Stark. wealth Ins. Co. 21 Pick. 468. Per Put-
157. Stevens on Average, 226, 5th ed. nam, J. }

Benecké, Pr. of Indem. 476.

(w) Stevens on Average, 225, 5th ed.

(x) † *Brooks v. Oriental Ins. Comp.* 7

Pick. 509. { See *Orrok v. Common-*

(y) Stevens on Average, 227, 5th ed.

The practice is the same in the United States. 2 Phillips on Ins. 510.

¹ The charge of a survey at the home port should not be added to make up the percentage. *Brooks v. Oriental Ins. Co.* 7 Pick. 270.

taken without any fixed destinations (the election of the ports of discharge being necessarily left to the captain's discretion, according to the exigencies of the case,) it became frequent for the underwriters to insert a stipulation that they should not be answerable for the risk of capture, seizure, or confiscation in the ship's port of discharge.¹

Warranties to be free of seizure and confiscation in port of discharge, and other excepted risks.

¹ In the United States a clause is frequently inserted in the policy, that "the insurers shall not be answerable for any charge, damage, or loss, which may arise in consequence of seizure or detention for or on account of illicit or prohibited trade, or trade in articles contraband of war." The question of the true interpretation of this clause came before the Supreme Court of the United States in the case of *Carrington v. Merchants Ins. Co.* 8 Peters, 496, 516, 517, 518. It was there held, that to bring the case within the clause, as an exception to the liability of the insurers, it is not necessary that there should be a legal or justifiable cause of *condemnation*; but that it is sufficient, that there is a legal or justifiable cause of *seizure and detention* for or on account of a supposed illicit or prohibited trade. If, therefore, there is a seizure or detention *bona fide* made upon a reasonable ground, such, for example, as if there was a well-founded suspicion of such illicit or prohibited trade, or probable cause to impute, or to justify further proceedings and inquiries, that would be a legal and justifiable cause of seizure and detention within the purview of the clause. *Bradstreet v. Neptune Ins. Co.* 3 Sumner, 615; *Magoun v. New Eng. Marine Ins. Co.* 1 Story, C. C. 157, 165; *ante*, 612, in note. For other cases in which this point has been considered, see *Higginson v. Pomeroy*, 11 Mass. 104; *Church v. Hubbard*, 2 Cranch, 167; *Smith v. Delaware Ins. Co.* 3 Serg. & R. 82; S. C. 3 Wash. C. C. 127; *Johnston v. Ludlow*, 1 Caines, 29; *Mumford v. Phoenix Ins. Co.* 7 John. 449; *Francis v. Ocean Ins. Co.* 6 Cowen, 404; *Cucullu v. Orleans Ins. Co.* 18 Martin, (Louis.) 11; *Cucullu v. Louis. Ins. Co.* 5 Martin, (N. S.) 464. Where barratry is also insured against, and the vessel is lost through the barratrous act of the master, in attempting an illicit trade, by smuggling a few articles in his possession, the insurers are liable, notwithstanding this clause against illicit trade. The illicit trade must be carried on by the assured himself, or with his knowledge or assent. He is not affected by the acts of the master or mariners. *Amer. Ins. Co. v. Dunham*, 15 Wendell, 9; S. C. 12 Wend. 463; S. C. 2 Hall, 422; *Suckley v. Delafield*, 2 Caines, Rep. 222; 3 Kent, (5th ed.) 266, in note. See *Magoun v. N. Eng. Marine Ins. Co.* 1 Story, C. C. 157; *Faudel v. Phoenix Ins. Co.* 4 Serg. & Rawle, 29; *Cucullu v. Orleans Ins. Co.* 18 Martin, (Louis.) 11. Under the exception of all risks on account of "trade in articles contraband of war," if the whole or a part of the goods insured are articles contraband of war, and a loss takes place in consequence, the insurers are not liable for such loss. *Johnston v. Ludlow*, 2 John. Cas. 481; *Loring v. United Ins. Co.* 2 John. Cas. 174, 487. The exception of the risk of "illicit and prohibited trade," as well as of trade in articles contraband of war, relates to the goods insured in the policy, and not to other goods shipped by the same vessel. *Bowne v. Shaw*, 1 Caines, 469; *Depeyster v. Gardner*, 1 Caines, 492. By *trade* in the exception respecting illicit trade, &c., is not necessarily implied an actual buying and selling, but any illicit act in the management and conduct of the enterprise on account of which the property is seized. *Smith v. Delaware Ins. Co.* 3 Wash. C. C. 127; *Andrews v. Essex Ins. Co.* 3 Mason, 6. A policy of insurance contained a clause, that "the insurers are not liable for seizure by the Portuguese for illicit trade." The vessel was seized and condemned by the Portuguese for an attempt to trade illicitly. The underwriters were held not liable for the loss. *Church v. Hubbard*, 2 Cranch, 167. See *Higginson v. Pomeroy*, 11 Mass. 112; *Smith v. Delaware Ins. Co.* 3 Wash. C. C. 127. In reference to the

Warranties to be free of seizure and confiscation in port of discharge, and other excepted risks.

What shall be taken to be the ship's port of discharge within the meaning of the warranty.

Various cases were decided on the construction of these clauses, in most of which the sole question was, whether the ship, at the time of seizure, was in that, which, with reference to the nature of the risk, and the whole circumstances of the case, could fairly be regarded as her *port of discharge*, within the contemplation of the parties to the policy. The courts, as the nature of the subject required, exercised great liberality of construction in forming a judgment on this point, guiding themselves rather by the nature of the risk and the intention of the parties, than by the strict and legal meaning of the term port.

Hence, it was decided by Lord Ellenborough, that if a ship, "warranted free from capture and seizure in her port of discharge," once come within the danger of capture from the land, for the purpose and with the intention of discharging her cargo, she should be considered to be in her elected port of discharge within the meaning of this warranty; and this whether she come to an anchor in an open roadstead outside a harbor, the same being a place where ships of burden *usually unload (z); or lie on and off in a river forming the estuary of a port, waiting for intelligence (a); provided in each case, that this be done for the purpose and with a design of discharging there; of which purpose and design the jury are the best, and, indeed, only proper judges. (b) If, on the other hand, the ship be moored, not only outside the harbor, but in the open sea, *outside the roadstead*, in which ships usually discharge their cargoes, though she be there captured

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(z) *Dalglish v. Brooke*, 15 East, 295, the leading case on the subject of this warranty. *Oom v. Taylor*, 3 Camp. 204. *Maydew v. Scott*, *ibid.* 205, overruling *Keyser v. Scott*, 4 Taunt. 660. (a) *Jarman v. Coope*, 13 East, 304. S. C. 2 Camp. 613. (b) *Reyner v. Pearson*, 4 Taunt. 662. *Levin v. Newenham*, *ibid.* 722.

exception of the risk of violating a blockade, see *Radcliffe v. United Ins. Co.* 7 John. 38; S. C. 9 John. 277; *Yeaton v. Fry*, 5 Cranch, 335. Notwithstanding the exception of the risk of prohibited trade, if goods, specifically described in the policy, are insured from a port where the exportation of them is universally known to be prohibited, the exception will not be applicable to them. *Seton v. Delaware Ins. Co.* 2 Wash. C. C. 175. A policy contained the exception "free from British capture and detention." An interruption of the voyage by British blockade was held to be within the exception. *Wilson v. United Ins. Co.* 14 John. 227.

by a force from the shore, this is not a loss from which the underwriters are protected by the warranty. (c)

Warranties to be free of seizure and confiscation in port of discharge, and other excepted risks.

Warranty to be free of confiscation in port of discharge.

Confiscation means more than capture, and imports "an act done in some way on the part of the government of the country where it takes place, and in some way beneficial to that government, though the proceeds need not, strictly speaking, be brought into its treasury." (d) Hence, where a ship, "warranted free from *confiscation* by the government in the ship's port or ports of discharge," was boarded in Pillau roads (a Prussian port) by two parties, one of Prussian soldiers, the other, part of the crew of a French privateer, and being carried into Pillau, the decision of the matter was referred by the Prussian courts to the Imperial Council of Prizes in Paris, by which tribunal the ship and cargo were condemned as prize to the French captors, and the property given up to them; this was held not to be a confiscation by the Prussian government, and therefore not a risk excepted by this warranty. (e)

Warranty to be free of capture and seizure in port generally.

The courts put a different construction on the warranty to be free of capture in the ship's "port of discharge," and on the warranty to be free of capture "in port or ports" generally. (f) In the first case, as we have seen, they considered the intended place of loading "the port of discharge," though an open roadstead, and not *infra præsidia portus*: in fact, as Mr. J. Bayley expressed it, in *Jarman v. Coape*, the word *port* in such warranties was regarded as used in contradistinction to the *high seas*. (g) On the other hand, they determined that a warranty against capture in port generally could not be available for the underwriters, unless the ship, at the time of capture, was actually within some port; and that it was not sufficient, under such a warranty, that she should then be in an open roadstead, where ships, in ordinary circumstances, sometimes lighten, but never discharge, their cargoes (h); nor within the headlands which form the mouth of a river. Hence, where a ship, insured from Rotterdam

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(c) *Mellish v. Stamford*, 3 Taunt. 499. *Levy v. Vaughan*, 4 Taunt. 387. *Keyser v. Scott*, *ibid.* 680. *Levin v. Newnham*, *ibid.* 722.

(d) *Per Lord Ellenborough* in 15 East, 269.

(e) *Levi v. Alkutt*, 15 East, 267.

(f) *Per Lord Ellenborough* in *Jarman v. Coape*, 2 Camp. 614.

(g) *Per Bayley, J.* in *Jarman v. Coape*, 15 East, 308.

(h) *Brown v. Tierney*, 1 Taunt. 517.

Warranties to be free of seizure and confiscation in port of discharge, and other excepted risks.

The declaration need not negative that the seizure was in port.

Where perils of the sea are the proximate cause of loss, the underwriter is not exempted by this warranty, *aliter* where the loss, though brought about by the perils of the sea, is proximately caused by capture and condemnation.

Livie v. Jansen, 12 East, 648.

Haba v. Corbett, 2 Bingh. 205.

to London, and "warranted free from capture in port," was captured while lying at anchor off Ghoree, in the river Maes, within the headlands which form the mouth of that river, the underwriters were held liable. (i) ¹

Where the policy contains a warranty against capture in ship's port of discharge, it is not necessary, in declaring for a loss by seizure, to negative that it was in port; at least, such declaration will be held good after verdict. (j)

If a ship with such a warranty be lost under such circumstances, that the proximate cause of loss is perils of the seas, though she be also captured and condemned, the underwriter will not be protected by the warranty: if, on the other hand, although she may have been severely damaged by sea perils, and thereby exposed to seizure, yet, if the capture and condemnation is the proximate cause of loss, the underwriter will be discharged.

Thus, where a ship, "*warranted free from American condemnation*," was driven upon the rocks, and much, though only partially damaged in trying to escape by night out of the port of New York from an American embargo, but the next day, having been deserted by her crew, was got off by *the Americans and condemned by them for breach of the embargo, the underwriters were held to be protected from a claim for total loss by the warranty (k); but where, under a policy on goods, destined for the South American republicans, and "warranted free from capture and seizure," the ship was totally wrecked on the sands about eight or nine miles from her port of destination, and the goods were taken from the wreck in a sea-damaged state, and confiscated under the authority of the Spanish Royalists, who had then got possession of the port, it was held, that here the proximate cause of

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(i) *Baring v. Vaux*, 2 Camp. 541.

(k) *Livie v. Jansen*, 12 East, 648.

(j) *Rucker v. Green*, 15 East, 288.

¹ See *Patrick v. Com. Ins. Co.* 11 John. 8. A policy on goods contained the clause, "no risk in port taken but sea risk." When the vessel was about four leagues from her port of destination, and two leagues from land, she was boarded from an armed launch and taken into port; and the goods were afterwards sequestered. The loss was held to be by capture and not by seizure in port. *Duval v. Commercial Ins. Co.* 10 John. 278. See *Watson v. Marine Ins. Co.* 7 John. 57.

loss was the perils of the seas, and, therefore, that the underwriters were liable, notwithstanding the warranty. (l) ¹

Where a ship, warranted "free of capture and seizure, and the consequences thereof in her port of loading," in order to avoid such seizure ran to sea before she was properly loaded, and was in consequence, obliged to put into port out of the course of the voyage insured, it was held that the underwriters, under this policy, were not liable (m); but where the freight of the same ship was insured by a policy which did not contain this warranty, it was held that they were liable for the same loss. (n)

It is customary at Lloyd's to insure live stock with a "warranty to be free from mortality and jettison;" and, in practice underwriters so insuring are not considered liable for any loss arising from mortality or death of cattle, where the ship arrives safe, but only where the ship is lost and the animals are drowned.

This usage, though undoubtedly established at Lloyd's, has been determined to be only *legally* binding upon those who can be shown cognizant of it, either in fact, or presumptively from residence in London or from being in the habit of transacting insurance business at Lloyd's. (o)

In order to avoid all possibility of misconception, it would *seem advisable for underwriters on live stock who wish thus to limit their liability, to warrant themselves free from all loss of any kind on the animals insured if the ship arrives safe.

We have already seen what losses will and what will not be considered as falling within the exception of losses by mortality. (p)

Warranties to be free of seizure and confiscation in port of discharge, and other excepted risks.

O'Reilly v. Royal Exch. Ass. Comp. 4 Camp. 246.

Warranty to be free of mortality and jettison.

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(l) Hahn v. Corbett, 2 Bingh. 205. 9 Moore, 390.

(m) O'Reilly v. Royal Exch. Ass. Comp. 4 Camp. 246.

(n) O'Reilly v. Goane, 4 Camp. 249.

(o) Gabay v. Lloyd, 3 B. & Cr. 793 5 Dowl. & Ryf. 541.

(p) Tatham v. Hodgson, 6 T. Rep. 656. Lawrence v. Aberdeen, 5 B. & Ald. 107. Gabay v. Lloyd, 3 B. & Cr. 793.

¹ But see Barnes v. Maryland Ins. Co. 5 Harr. & John. 139.

OF GENERAL AVERAGE.

In the three preceding chapters we have considered losses as covered or not covered by the policy: in the two which follow under the head of general and particular average, we shall have to consider them with reference to their producing cause and the mode of their compensation: in treating of total and partial loss we shall regard them with reference to the amount of damage sustained by the thing insured and the corresponding extent of the assured's claim upon the underwriter.

In the present chapter we propose to treat of general average under the following heads:—

Sect. I. Principles of the doctrine of general average.

Sect. II. General average losses — sacrifices for the common benefit.

Sect. III. General average losses — extraordinary expenditures for the common benefit.

Sect. IV. What contributes to general average.

Sect. V. Principles of adjustment, as applied to different kinds of general average losses.

Sect. VI. Mode of estimating the amount of loss for the purposes of general average adjustment.

Sect. VII. Mode of estimating the value of the property saved for the purposes of general average adjustment.

Sect. VIII. Of foreign adjustment.

Sect. IX. Liability of owners of ship, freight, and cargo, for general average contribution.

Sect. X. Liability of underwriters in respect thereof.

§ 323. The term "general average" is used indiscriminately, sometimes to denote the *kind of loss which gives a claim*

to *general average contribution* and sometimes to denote *such contribution itself*: in order to avoid confusion, it would have been better to use the term *general average loss*, when speaking of the *former*, and *general average contribution*, when speaking of the *latter*. All losses which give a claim to general average contribution, may be divided into two great classes — 1. Those which arise from *sacrifices* of part of the ship or part of the cargo purposely made in order to save the whole adventure from perishing. 2. Those which arise out of extraordinary *expenses* incurred for the joint benefit of both ship and cargo.¹

Principles of the doctrine of general average.

General average losses — what.

General average losses divided into two great classes.

Losses of the first class are those which are alone mentioned in the text of that Rhodian Law which is generally regarded as the foundation of the whole doctrine of general average (*a*):² but it is evident that expenses incurred by the owner of part of the adventure for the joint benefit of the whole give just as valid a claim to contribution in general average as any other species of loss intentionally incurred for the same purpose; and they have been accordingly admitted to give such a claim by the law and practice of all maritime states.

The only distinction between these two classes of losses, is in the principles upon which they are contributed for, which, as we shall see in the sequel, vary in the two cases: and upon this ground it becomes of practical importance to bear the distinction in mind.

Practical distinction between the two.

A general average loss, therefore, may be defined to be “*a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, for the joint benefit of ship and cargo.*” (*b*)³

Definition of general average losses.

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(*a*) The bare text of that law, in fact does not extend to the sacrifice even of part of the ship, and is confined in terms

solely to the case of jettison; “*jactus factus levandæ navis gratiâ.*”

(*b*) Per Lawrence J. in *Birkley v. Presgrave*, 1 East, 228.

¹ This subject is very fully discussed in Abbott, Ship. (6th Am. ed.) 473 to 511. Part 4, Ch. X. to which the reader is respectfully referred; and also to 3 Kent, (5th ed.) 232 to 245.

² *Columbian Ins. Co. v. Ashley*, 13 Peters, (S. C.) 337, 338. Per Story, J.

³ Mr. Chancellor Kent says, — “General, gross, or extraordinary average, means a contribution made by all parties concerned, towards a loss sustained by some of the parties in interest, for the benefit of all; and it is called general or gross average, because it falls upon the gross amount of ship, cargo, and freight.” 3 Kent, (5th ed.) 232. See *Onok v. Commonwealth Ins. Co.* 21 Pick. 470. Per Putnam, J.

Principles of the doctrine of general average.

Principle of general average contribution.

Definition of general average contribution.

Adjustment of general average, and liability of the underwriters.

The plainest principles of equity require that the sacrifices so submitted to should be *made good* (sarciantor); and the expenses incurred be *repaid*, by a general contribution from all those benefited by either the one or the other, in proportion to the value of the property, which those sacrifices and expenses have been instrumental in saving. (c) Hence, a general average contribution may be defined to be a contribution by all parties *in a sea adventure, to make good the loss which has been sustained by one or more of their co-adventurers, from sacrifices made or expenses incurred for the general benefit.* (d)

The amount paid by each of the co-adventurers, as his share of the contribution, is exactly proportioned to the value of his property, as finally saved by the *sacrifice*, or at the time it was benefited by the *expenditure*; this sum is ascertained in most cases directly after the ship's arrival at her port of destination, and is there assessed upon each of the co-adventurers, who are in law *primarily* liable to the party who has suffered by the loss: if, however, they are insured, they are entitled to claim from their underwriters the same proportion of the sum insured in the policy, as the amount assessed upon them by way of contribution, bears to the whole value of their property, as saved by the sacrifice. (e) In practice, accordingly, whenever ship or goods are insured, general average losses, when their amount is once ascertained, are settled by the underwriters. The process by which the amount of damage is ascertained, and the different sums to be paid in contribution for it are assessed upon the parties interested, and made good to them by the underwriters, is called the *adjustment of general average*.

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A general average loss must result from the act of man.

*§ 324. Having thus given a brief sketch of the doctrine of general average, let us proceed to examine it more in detail, and commence by inquiring into the characteristics of those losses which give a claim to general average contribution. The leading characteristic of a general (as distinct from a particular) average loss, is, that it is the intentional

(c) *Æquissimum enim est commune suus salvas habuerint. Dig. lib. xiv. detrimentum fieri eorum, qui propter am-* tit. 2.

tas res alienas, consecuti sunt, ut merces

(d) See Stevens on Average, 2. 5th ed.

(e) 1 Mangens on Ins. 55.

result of the act of man, not the inevitable result of the perils insured against; it arises from damage purposely submitted to, or directly effected by the agency and will of man; not accidentally caused by the agency of the winds and waves. (*f*)¹

Principles of the doctrine of general average.

A storm arises: the ship is making water with every sea, or is drifting in upon rocks and breakers, and in imminent danger of being lost: if goods are thrown overboard to lighten her, or masts cut away to bring her up, the damage so sustained by the owner of the goods or the ship, is a loss which gives them a claim to general average contribution; in other words, is a general average loss. If, under similar circumstances, instead of being thus sacrificed for the common safety, the goods are washed out by the waves, or the mast snaps asunder by the wind, the loss falls entirely upon the party whose property was thus damaged; in other words, is a particular average loss.

In order to entitle the party sustaining such loss to a general average contribution, it must appear to have been incurred with a view to the general safety of the whole adventure (*i. e.* of the ship, cargo and freight). The principle of the Rhodian law is, *ut omnium contributione sarciantur quod pro omnibus datum est.* (*g*) The loss, which is to entitle one of the co-adventurers to a contribution from *all*, must be suffered for the sake of *all*; and accordingly we find that the sea laws of the Middle Ages invariably required that the master, before he could claim a general average contribution, should swear that the sacrifice was made to *save the ship, the cargo, and the lives and liberties of the crew.* (*h*)

The loss must be incurred for the benefit of the whole adventure.

*So it has been held in this country, that where the general safety of the whole adventure is not imperilled, a loss incurred for the safety of a part thereof cannot give a claim to

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Where the general safety of the whole adventure is not imperilled, a loss incurred for the safety of part gives no claim to contribution. *Nesbitt v. Lushington*, 4 T. Rep. 783.

(*f*) Emerigon, chap. xii. sect. 39. vol. i. p. 568., ed. 1827.

(*g*) Dig. lib. xiv. tit. 2, f. 1.

(*h*) "Pour sauver leurs corps, la nef, et les denrées." Jugemens d'Oleron, art. 8.

Pardessus, Lois Mar. vol. i. p. 328.

"Tho beholden ihr Liff, Schiff, und Gut."

Laws of Wisbuy, art. 22. Pardessus, Lois Mar. vol. i. p. 476.

"Les personnes, et le haver, et tot quant aqha." Consolato del Mare, c. 54, of the original Catalan. Pardessus, Lois Mar. vol. ii. p. 104, chap. 97, of the Italian translation.

¹ See *Peters v. Watson Ins. Co.* 1 Story, C. C. 463; 3 Kent, (5th ed.) 232, 233; 2 Phil. Ins. 73.

Principles of
the doctrine of
general average.

contribution in general average. Thus where a mob in Ireland boarded a ship partly laden with corn, and would not leave her till they had compelled the captain to sell them the corn at a certain low rate ; it was contended on the part of the assured, that, as the captain was thus *obliged* to let the people take the corn, in order to induce them to spare the *rest of the cargo*, this was a general average loss ; but Lord Kenyon held that this was not so, *because the whole adventure never was in jeopardy* : for the persons who took the corn intended no injury to the ship, or any other part of the cargo, but the corn. (i) Upon the same principle Mr. Benecké maintains that if the master of a neutral ship who had secretly taken enemy's goods on board, should, *from fear of having these goods confiscated*, slip his anchor or throw those particular goods overboard, neither he nor the owners of these goods would have any claim to contribution upon the other parties to the adventure, because such sacrifice was made not to save the whole, but only a part. (j) In the same way, where expenditures appear to have been made not for the joint benefit of both ship and cargo, but for the benefit either of the ship alone, or of the cargo alone, they can give no claim to general average contribution, but will be a charge on the owner of the particular interest benefited thereby. Thus as we shall see more at large hereafter, the expenses of *making a port of distress, in order to refit*, are a general average loss, because the act of making the port is for the common benefit both of the ship and cargo. (k) But the expenses of *repairing the ship* after the port is once entered, *fall solely upon the shipowner himself, for whose benefit alone they have been incurred. (l)

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The general
safety must be
the object of the
sacrifice.

The general safety of the whole adventure must also be the *motive* for the sacrifice ; and if made with any other object, it can give no claim to a general average contribution. Thus, where the captain of a ship which was just on the point of capture threw overboard a quantity of dollars, not to save the ship and cargo, but *merely to prevent the dollars from falling into the enemy's hands*, this was held not to be such a jettison

(i) Nesbitt v. Lushington, 5 T. Rep. 783.

(k) See *post*, Sect. III. Art. 3.

(l) See *post*, Sect. III. Art. 3.

(j) Benecké, Pr. of Indem. 223.

as could entitle the owner of the dollars to a general average contribution. (m)

Principles of the doctrine of general average.

It has also been laid down that not only must the sacrifice be made with a view to the safety of the whole adventure, but that it must also accomplish that object, at least for the time, otherwise it can give no claim to a general average contribution. (n)¹ It is quite clear, indeed, that if both ship and cargo entirely perish in spite of the sacrifice, so that nothing of either comes to the hands of their respective owners, no contribution whatever is due. The really difficult question arises in cases where the ship is wrecked by the agency of the very peril to avert which the sacrifice was made, but the goods or a part of them are saved: in such cases, does that which is saved contribute for that which has been sacrificed? The question is one of great nicety and some doubt; for which reason it has been thought better to reserve its discussion to another part of the chapter than to introduce it here, where the object is to enumerate only the undoubted requisites of a general average loss. (o)

Query, whether the peril must be averted by the sacrifice, in order to give a claim to general average contribution?

It is an undoubted requisite of a general average loss that it should have been incurred under the pressure of a real and imminent danger. The sacrifice may have been *bond fide* made with a view to the general safety; but it can give no claim to contribution unless that safety shall appear to have been really endangered. I am not bound to make good to

The loss must be submitted to under the pressure of imminent danger.

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(m) *Butler v. Whidman*, 8 B. & Ald. edition (A. D. 1844) of Chancellor Kent's Comm. vol. iii. p. 234, note (c).

(n) See the authorities collected, and the result given as above, in the last

(o) See post, Sect. V.

No loss or expense is to be considered as general average, and so applied in making up a loss, unless, in the first place, it was intended to save and preserve the remaining property, and unless, in the second place, it succeeded in doing so. *Williams v. Suffolk Ins. Co.* 3 Sumner, 510; *Scudder v. Bradford*, 14 Pick. 13; *Whitridge v. Norris*, 6 Mass. 125; *Nickerson v. Tyson*, 8 Mass. 467; *Magrath v. Church*, 1 Caines, 196; *Sansom v. Ball*, 4 Dallas, 459; *Sims v. Gurney*, 4 Binney, 524. See *Bevan v. United States Bank*, 4 Wharton, 301; *Walker v. U. S. Ins. Co.* 11 Serg. & R. 61. Before contribution takes place, it must appear that the goods sacrificed were the price of safety to the rest; and if the ship be lost, notwithstanding the sacrifice, there will be no ground for contribution. 3 Kent, (5th ed.) 234, 235; Pothier, Tit. *Avaries*, n. 113. There is no contribution, if, at the time of sacrificing the cargo, there was no possibility of saving it. *Crockett v. Dodge*, 12 Maine, 190. So of the vessel run ashore, when there is no possibility of saving her. *Meech v. Robinson*, 4 Wharton, 360. See *Walker v. Un. S. Ins. Co.* 11 Serg. & R. 61.

Principles of the doctrine of general average.

another a loss he has intentionally incurred, with a view to my benefit, if such loss was one which a man of ordinary firmness and sound judgment would not, under the circumstances, have submitted to. *The sacrifice must have been made under the urgent pressure of some real and immediately impending danger, and must have been resorted to as the sole means of escaping destruction.*

"In order to give a claim," says Emerigon, "to a general average contribution, it is not enough that a jettison has been made: that measure must have been forced upon those resorting to it by the fear of perishing," (*par la crainte de périr.*) "A panic terror," says the same great writer, "will not excuse the captain who has had recourse to a jettison without being forced to it by real danger." (*p*)

The sacrifice must not be resorted to without such deliberation as the case may admit of.

The old sea-laws detail with great minuteness all the forms which ought to be observed by the captain before proceeding to make any sacrifice for the general safety. (*q*) In modern times Mr. Stevens gives it as the practical rule to be observed, where the case admits of it, that the master should consult the most experienced of the crew and the supercargo, if there be one on board; and then make as minute an entry in his log-book as the case may require, and, immediately on arriving at the first port, note, and, if possible, extend his protest. (*r*)

It is obvious, however, that in those cases of desperate and urgent danger, which allow no time for hesitation and discussion, no greater degree of deliberation should be required than may be necessary to rescue the measures resorted to from the reproach of rashness.

"The rule of consulting the crew," says Lord Kenyon, "is rather founded on convenience, and to avoid dispute, *than on necessity." (*s*) "A consultation with the officers," remarks Mr. J. Story, "may be highly proper, in cases which admit of delay and deliberation; but if the propriety and necessity of the act be otherwise sufficiently made out, there is an end of the substance of the objection." (*t*)

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(*p*) Emerigon, chap. xii. sect. 39, vol. i. pp. 587, 588, ed. 1827.

(*q*) Jugemens d'Oleron, art. 8, 9. Pardessus, Lois Maritimes, vol. i. p. 328. Laws of Wisbuy, art. 20, 21, *ibid.* p. 475. Consolato del Mare, art. 97, 109, of the Italian translation; caps. 54, 56, of the

original. See Pardessus, Lois Maritimes, vol. ii. pp. 104 - 112.

(*r*) Stevens on Average, 29, 5th ed.

(*s*) Birkley v. Presgrave, 1 East, 228.

(*t*) † In Colonial Ins. Comp. v. Ashby, 13 Peters (S. C.) Rep. 343, 344.

In fact, as Chancellor Kent, with his usual felicity of style, has stated the law on this subject, "*consultation is not indispensable previous to the sacrifice. A case of imminent danger will not permit it; but it must appear that the act occasioning the loss was the effect of judgment and will; and there may be a choice of perils, where there is no possibility of safety.*" (u)¹

Principles of the doctrine of general average.

It remains to notice another principle, of great importance in determining whether a loss be or be not such as to give a claim to general average contribution, viz. that no such claim can be sustained *unless the sacrifices and expenditures out of which it arises were of an EXTRAORDINARY nature*; in other words unless they were something over and beyond those ordinary duties and ordinary expenses of the navigation to which the shipowner is bound by the nature of the contract between himself and the freighter, and for which he is to be remunerated by the freight. By the contract of affreightment, the shipowner is bound to do all that is requisite, in the ordinary course of the voyage, for the safe transport of the goods to their port of delivery. (v) *All expenses, therefore, incurred, and all ordinary manœuvres rendered necessary for the purpose of so transporting the goods, or keeping the ship in a fit state so to transport them, are a direct consequence of his contract with the freighters, and being merely within the strict scope of his ordinary duty as shipowner, cannot entitle him to any recompense but that which was his consideration for undertaking such duty, viz. the freight.* (w)

The sacrifices and expenses from which the claim arises must be of an extraordinary nature.

*On this principle it is that the expenses of necessary repairs done to the ship in a port of distress, and the wages and provisions of the crew during a delay for that purpose are not

* 886

(u) 3 Kent's Comm. (5th ed.) 233.

"toutes ces mesures sont comprises dans l'obligation de transporter la cargaison."

(v) 3 Kent's Comm. (5th ed.) 208, et seq. Comment. on Emerigon, vol. i. p. 610,

(w) "En effet," says Boulay-Paty, ed. 1827. See also 2 Phillips on Ins. 77.

¹ See *Sims v. Gurney*, 4 Binney, 513; *Abbott, Ship*. (6th Am. ed.) 476, 477. The master is responsible for the due exercise of his own judgment in case of a jettison. He has the authority, and if he shows a necessity for the sacrifice, he will be excused, whether he follows the advice of his crew or not. The crew of a vessel are not authorized to make a jettison of any part of the cargo, even in a case of distress, without the order of the master. This is the general rule, without reference to extreme cases. *The Nimrod, Ware, Rep.* 14, 15.

Principles of the doctrine of general average.

What are extraordinary sacrifices.

in this country considered a fit subject of general average contribution. (x)¹

On the same principle, when the shipowner, in order to save the ship under circumstances of danger, resorts to hazardous manœuvres which result in the destruction of some part of the ship and rigging; as when, for instance, he carries away sails, or springs a mast, in attempting, under a press of canvas, to escape an enemy or a lee shore, this has been held in this country, and also in France, not to give a claim to general average contribution (y); and this because the manœuvre only consisted in the employment of the ship's tackle for one of the *known and usual purposes of navigation*, and therefore fell within the scope of those ordinary exertions to which the ship owner is bound by his contract with the freighter.

It is, of course, very difficult to practise to draw the line accurately between what shall be considered ordinary and what extraordinary expenses and sacrifices: the following case has frequently been cited as a good instance of that extraordinary kind of sacrifice which would everywhere be acknowledged to give a claim to general average contribution.

Sacrifice of boat in order to save ship and cargo from imminent capture.

The captain of a French ship, who had been chased all day by an enemy, who was rapidly gaining on him, at nightfall deliberately launched his long boat, fitted her with a mast and sail, fixed a lantern in her mast head, and set her adrift; at the same time he hauled down the *ship's* lights and altered her course. The long boat, followed by the enemy, drifted away before the wind and was lost: the ship, by means of this manœuvre, escaped. The loss of the boat under these circumstances was held to be a general average *loss, having been an extraordinary sacrifice, intentionally made for the sake of saving the ship and cargo. (z)

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(x) See *post*, Sect. III.

(z) Emerigon, chap. xii. sect. 41, vol.

(y) *Covington v. Roberts*, 2 Bos. & I. p. 606, ed. 1827.
Full. N. E. 378. Boulay-Paty on Emerigon, vol. i. p. 610, ed. 1827.

¹ Otherwise as to wages and provisions, in some of the United States. See *post*, 911, and in note.

Upon the whole, then, it appears, that before a party interested in a sea-venture can establish his claim to a general average contribution, he must show that the loss he has sustained has arisen, not from any accident, but from some — (1.) Intentional sacrifice, or voluntary expenditure, (2.) Purposely resorted to for the safety of the whole adventure,¹ (3.) Under the pressure of real and imminent danger. It must also appear, (4.) That the sacrifice or the expenditure was the result of due deliberation ; (5.) That it is not included in those ordinary duties and expenses of the navigation which come under the head of wear and tear, and are paid out of the freight.

Principles of the doctrine of general average.

Recapitulation.

SECT. II. *General Average Losses. Sacrifices for the Common Benefit.*

ART. 1. *Sacrifices of Part of the Cargo for the General Safety.*

§ 325. Having ascertained the principles on which all claims to general average contribution are founded, the next step is to enumerate the different cases in which these claims may be made good ; in other words, to specify the principal instances of general average loss.

General average losses — sacrifices for the common benefit. — Jettisons.

Division of general average losses.

All general average losses may, as already indicated, be divided into two great classes : 1. SACRIFICES of part of the cargo, or of part of the ship, for the joint benefit of both ; 2. EXPENDITURES incurred with the same object. (a) We will begin with considering those losses which arise out of *sacrifices of part of the cargo*, and take first the case of *jettison, which is the simplest and most perfect instance of a general average loss. Jettison is defined in the Rhodian law to be *jactus mercium factus levandæ navis gratiâ* (b), a heaving overboard of the goods in order to save the ship. It is the

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(a) The able writer on Marine Insurance here adopted is equivalent, and more so in M'Culloch's Commercial Dictionary. (b) Dig. lib. xiv. tit. 2, § 1.

¹ It must also appear that it was successful. *Ante*, 883, note.

General average losses — sacrifices for the common benefit. — Jettisons.

Jettison.

There are certain goods whose jettison gives no claim to contribution.

Such as deck goods.

Unless so carried by custom of trade.

most perfect example of a general average loss, and when made intentionally, for the sake of saving the whole adventure from imminent danger (c), is generally admitted as giving a claim to contribution.

There are, indeed, some goods, the jettison of which gives no claim to contribution, as for instance, goods, of which there is no bill of lading (d); or which are taken on board by the captain contrary to the charter-party. But the most important exception is that of goods *carried on deck*, which, as they tend to embarrass the navigation, are not contributed for, if jettisoned (e),¹ unless they are so carried according to the common usage and course of trade on the voyage for which they are shipped. (f) On proof, however, of such usage, they are contributed for, if jettisoned, like other goods; and no notice to the underwriters of the existence of such custom is necessary in order to make them liable, they being bound to know the usage of the particular trade. (g) Thus, carboys of vitriol (h), timber on the voyage between London and Quebec (i), and pigs between London and Waterford (j), have been contributed for, after jettison, though carried on deck, an usage of trade being proved, in each case, so to carry them.²

(c) Not otherwise; see *Butler v. Wildman*, 3 B. & Ald. 398.

(d) Code de Commerce, art. 420. Prussian Code, § 1851. Ordenanzas di Bilbao, c. 21. art. 7. See also Baldasseroni, tom. iv. tit. 5, § 36.

(e) Emerigon, chap. xii. sect. 42, vol. i. p. 623, ed. 1827. *Benecké, Pr. of Indem.* 293. *Abbott on Shipping*, 350, 6th ed.

(f) *Ross v. Thwaites*, Park, 23, 8th ed. *Backhouse v. Ripley*, *ibid.* 24. Code de

Commerce, art. 421. *Hamburg Ordinance*, tit. 22, art. 8.

(g) Valin, *Comment. on Ord. tit. du Jet*, art. 13, vol. ii. p. 532, ed. 1829.

(h) *Da Costa v. Edmunds*, 4 Camp. 142. < See the remarks on this case in *Taunton Copper Co. v. Merchants Ins. Co.* 22 Pick. 108, 113, to 115. >

(i) *Gould v. Oliver*, 4 Bingh. N. C. 135.

(j) *Milward v. Hibbert*, 3 Q. B. 120.

¹ *Abbott, Ship*. (6th Am. ed.) 481 to 490, and notes; *Lenox v. United Ins. Co.* 3 John. Cas. 178; *Smith v. Wright*, 1 Caines, 33; 3 Kent, (5th ed.) 240; *Crocker v. Mer. Ins. Co.* Sup. Jud. Court, Suff. Mass. (1839,) cited 2 Phil. Ins. 78; *Johnston v. Crane, Kerr*, (New Bruns.) Rep. 356. It is otherwise as to the ship's boat. *Lenox v. United Ins. Co.* 3 John. Cas. 178.

² *Browne v. Cornwell*, 1 Root, 60. But in *Cram v. Aiken*, 13 Maine, 229, in an action for contribution against the owners of a vessel, on the deck of which the plaintiff's goods had been shipped according to the uniform usage of the trade, and at full freight, it was held, that goods thus shipped on deck, and lost by jettison, are not entitled to the benefit of general average. The same substantially had been decided before, in *Dodge v. Bartol*, 5 Greenl. 256. See *Barber v. Brace*, 3 Conn. 9; *Abbott*,

Where, in the course of the voyage, in order to save a ship from foundering, to float her after stranding, or to enable her to make a port of distress, part of the cargo is put into boats and lighters, and lost before reaching the shore, such loss gives a claim to general average contribution (*k*); for it is regarded as though it were a jettison (*proinde si jactura facta esset*) (*l*), being an intentional exposure of the goods to imminent and extraordinary risk, with a view to the ship's safety. (*m*)¹

If, however, the goods be thus hazarded in the ordinary course of the voyage, and not in order to rescue the ship from any extraordinary or impending danger; as where, in the usual course of the navigation, they are necessarily sent on in boats or lighters from the ship to the port of destination, their loss gives no claim to contribution. (*n*)

If, in the case first supposed, the boat employed for the purpose of taking out the goods, itself belong to the ship, it must, as well as the goods, be contributed for, if lost (*o*)

If, however, in the same case, the ship and rest of the cargo be lost, no contribution is made in respect thereof by the goods thus exposed for the general welfare, even though they themselves arrive safe; for, as they do not owe their preservation to the loss of the ship, they cannot be liable to

General average losses — sacrifices for the common benefit. — Jettisons.

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Exposure of part of goods in lighters regarded as a jettison, if made under extraordinary circumstances. But not if it be done in the ordinary course of the navigation.

No contribution made by goods thus exposed, where ship and cargo are lost.

(*k*) Emerigon, chap. xii. sect. 41, vol. i. p. 599, ed. 1827. Benecké, *System des* p. 459, ed. 1829. Benecké, *Pr. of Indem.* Assurances, vol. iv. pp. 56, 57, ed. 1810. 178.

Abbott on Shipping, 428, 6th ed.

(*l*) Dig. lib. xiv. tit. 2. f. 4.

(*m*) Benecké, *Pr. of Indem.* 178.

(*o*) Emerigon, chap. xii. sect. 41. vol. i. p. 599, ed. 1827.

Ship. (6th Am. ed.) 482 to 485, in note; Hampton v. Brig Thaddeus, 4 Martin, (N. S.) 562; Wolcott v. Eagle Ins. Co. 4 Pick. 429. These cases were decided before Gould v. Oliver, and Milward v. Hibbert, referred to in the text. Mr. Chancellor Kent says, — "Goods shipped on deck contribute, if saved, but if lost by jettison, they are not entitled to the benefit of general average; and the owner of the goods must bear the loss without contribution; for they, by their situation, increase the difficulty of the navigation, and are peculiarly exposed to peril. Nor is the carrier in that case responsible to the owner, unless the goods were stowed on deck without the consent of the owner or a general custom binding the owner, and then he would be chargeable with the loss." 3 Kent, (5th ed.) 240. Most of the cases, above referred to, are cited in support of this doctrine. But Milward v. Hibbert had not appeared when it was written. Gould v. Oliver, is cited by the learned chancellor in his note.

¹ See Heyliger v. N. York Fireman's Ins. Co. 11 John. 85; Lewis v. Williams, 1 Hall, 430.

General average losses — sacrifices for the common benefit. — Jettisons.

contribute to such loss (*p*); neither, in case the ship is lost, but the cargo or a portion of it saved, can the portion so saved be liable to contribute for the goods transhipped. (*q*)

There are two conflicting decisions¹ in the United States upon the question, whether, if the goods thus exposed are damaged, or jettisoned in their transit from the ship to the shore, their owners can claim contribution from the owners of the other goods similarly exposed. Mr. Phillips thinks they may, and, on principle, he seems to be right. (*r*)

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Goods given by way of composition to pirates, &c.

*If goods be voluntarily and without fraud given up to pirates, &c. by way of composition, the loss thence arising is a general average loss; for the goods in such case are as much sacrificed for the general safety as though they were jettisoned. (*s*) If forcibly taken by pirates or plunderers, it is, of course, otherwise, there being in such case no voluntary submission to loss. (*t*)

Damage done by jettison.

On the ground, that the accessory follows its principal, all damage necessarily caused to other goods, or to the ship by the jettison, itself gives a claim to general contribution. (*u*) Thus, if holes are cut in the ship in order to get goods or stores out for the sake of lightening her (*v*); or if goods, after being brought up on deck, in order that other less valuable goods stowed beneath them, may be jettisoned, are themselves washed overboard or damaged by the sea, the loss is, in both cases, a general average loss. (*w*) So, where water is thrown down a ship's hatches to extinguish an accidental fire, and other goods are damaged thereby. (*x*)²

(*p*) Code de Commerce, art. 427. Benecké, Pr. of Indem. 212, 213. Abbott on Shipping, 428, 6th ed. See also the Guidon, c. 5. art. 28. "Car il n'y a avec qui contribuer."

(*q*) Benecké, Pr. of Indem. 213.

(*r*) 2 Phillips on Ins. 83-85.

(*s*) Hicks v. Palington, Moore; 297. { Abbott Ship. (6th Am. ed.) 477. }

(*t*) Nesbitt v. Luahington, 4 T. Rep. 783.

(*u*) Code de Commerce, art. 400, § 5. Emerigon, chap. xii. sect. 41. vol. i p. 601, ed. 1827. 2 Phillips on Ins. 82.

(*v*) Benecké, Pr. of Indem. 177, 178. Stevens on Average, 12, 5th ed.

(*w*) Benecké, Pr. of Indem. 213.

(*x*) Stevens on Average, 42, 5th ed. Benecké, Pr. of Indem. 243.

¹ Lewis v. Williams, 1 Hall, 430, deciding in the affirmative, and Whitteridge v. Norris, 6 Mass. 125, in the negative, of the question stated in the text.

² All damage immediately arising from jettison, or other act of necessity, is to be contributed for, though it happen to perishable articles, which remain in specie. Thus, where, in cutting away the mast, it splintered below the partners, and made an opening by which water was let into the hold, in consequence of which the cargo,

On the same principle the freight, which but for the jettison, the shipowner would have received for the goods jettisoned, must be made good to him by a general average contribution. (y) ¹

Goods jettisoned still belong to their former owners, and, if recovered from the sea, may be reclaimed by them on paying the expenses of salvage. *Res jacta domini manet nec fit adprehendentis, quia pro derelicto non habetur.* (z)

General average losses — sacrifices for the common benefit. — Jettisons.

Freight of goods jettisoned.
Property in goods jettisoned.

*ART. 2. *Sale of Part of Cargo for the Common Benefit.*

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§ 326. In cases of *absolute* necessity, when the master, being in a foreign port, has no other means whatsoever of raising money, he may, as we have already seen, sell part of the cargo for the purpose of procuring funds.

Sale of part of cargo, when allowed.

This right is recognized and sanctioned alike by the earliest and most recent codes of maritime law (a), and by the jurisprudence of our own country. (b)

In such cases, according to the expression of Lord Stowell, "a portion of the cargo is abraded for the common benefit;" and the transaction is considered to be in the nature of a *compulsive loan* from the owner of the goods so sold for the benefit of all concerned. (c)

Nature of the transaction.

When such sale is clearly made out to have been for the *general benefit*, it entitles the owner of the goods so sold to claim a general average contribution in respect of the loss he

When it gives a claim to general average contribution.

(y) Benecké, Pr. of Indem. 178. 2 Phillips on Ins. 91. ian translation; chap. 62, in the original Catalan, see Pardessus, Lois Maritimes, vol. ii. p. 110. See also the Code de Commerce, art. 234.

(z) Dig. lib. xiv. tit. 2, f. 8. Emerigon, chap. xii. sect. 40, vol. i. p. 596. ed. 1827. (b) See the famous case of The Grati- tudine, 3 Rob. Adm. Rep. 235.

(a) See the judgments of Oleron, art. 22, in Pardessus, Lois Maritimes, vol. i. p. 339. Laws of Wisbuy, art. 39, cited as 44, in Pardessus, ibid. p. 480. The Consolato del Mare, cap. 105, of the Ital- (c) See the judgment of Lord Ellen- borough in Powell v. Gudgeon, 5 Maule & Sel. 431.

consisting of corn, was damaged, this damage was considered a subject of contribution. *Maggrath v. Church*, 1 Caines, 214; *Saltus v. Ocean Ins. Co.* 14 John. 138.

¹ So, in case of contribution for the loss of the ship by voluntary stranding, the freight is to be contributed for. *Columbian Ins. Co. v. Ashby*, 13 Peters, (S. C.) 344.

General average losses. — sacrifices for the common benefit. — Sale of part of cargo.

has sustained by the transaction, just as though the goods had been jettisoned. (d) ¹

In fact, the case of goods so sold for the general benefit bears a considerable resemblance to the case of jettison, for, in both alike, the owner is deprived of his property for the common benefit, and to him it must be immaterial whether the loss arises from a sacrifice at sea or on shore. (e)

The loss arising out of such sale gives no claim to contribution where the sale is effected to supply the ordinary expenses of the voyage.

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If, indeed, the goods are sold by the shipowner merely to defray the expenses of those *necessary repairs of the ship*, which he himself is in duty bound to provide by the very contract of affreightment, then, upon the principles already developed, the loss incurred by these sales cannot be made *the subject of a general average contribution, but must be made good by the shipowner alone, to the owner of the goods so sold. The captain is bound to have his ship in a navigable state; and if, being unable to raise the means of refitting her, he is obliged to force a loan from the owners of the goods by the sale of their property, he must himself compensate them for the loss so occasioned.

Powell v. Gudgeon, 5 M. & Sel. 431.

The English courts have proceeded on these principles.

Thus, where a ship was forced to put back into port to repair *the accidental damage done to her by a storm*, and the master, having no other means of raising money, sold part of the cargo to defray the expense of the repairs, the court held, that the owners of the goods so sold could not recover against their underwriters a ratable proportion of the loss they had so incurred, but must make their claim against the shipowners alone. (f)

Dobson v. Wilson, 3 Campb. 479.

So, where the captain of a ship, having been arrested in a foreign port for the *necessary repairs* of his ship while she lay there, sold part of the cargo in order to procure his liberation. Lord Ellenborough held that the sale of the goods under these circumstances was not a sacrifice for the *joint benefit* of ship and cargo, and therefore could give no claim to a general

(d) 3 Kent's Comm. (5th ed.) 242.

(f) Powell v. Gudgeon, 5 Maule &

(e) Per Mr. J. Story in the case of Sel. 431. S. P. in Sarquy v. Hebson, 4 The Ship Packet, 3 Mason, 255.

Bingh. 131.

¹ Giles v. Eagle Ins. Co. 2 Mefcalf, 140, cited *post*, 910, in note. See Orrok v. Commonwealth Ins. Co. 21 Pick. 469; Depau v. Ocean Ins. Co. 5 Cowen, 63.

average contribution. (g) "If," said his lordship, "the ship had been seized for non-payment of the Sound dues, I should have thought that a sale *made for the sake of liberating both ship and cargo* from such detention, might have been the foundation of a claim for general average." (h)

General average losses — sacrifices for the common benefit.

From these decisions (as Mr. Beneeké has truly observed (i)) it by no means follows, that the loss arising from the sale of goods can in no case be considered in this country as giving a claim to general average; on the contrary, it seems abundantly clear, from the language of Lord Ellenborough, in the case last cited, that a claim to general contribution would be held to be established whenever such sale *was manifestly resorted to with a view to the joint benefit of both ship and cargo, or to repair losses, which themselves come into general average.

Where the expenses or losses are themselves general average, the loss arising from goods sold to repair or defray them is general average also.

* 893

Thus there can be little doubt that goods, sold to defray the expenses of making a port of distress to refit, or of replacing masts, cables, &c. which had been sacrificed for the general safety, would be made good in this country by a general average contribution. (j) On the whole, therefore, the law of England on this subject seems to be, 1. That where goods are sold by the captain in order to raise funds for repairing particular average losses, or for defraying the ordinary expenses of the navigation, the loss arising from their sale must be made good by the ship owner alone, who must, in such case, pay the merchant the price which the goods would have fetched at their place of destination, deducting therefrom the freight which would have been due for their conveyance. (k) 2. Where, on the other hand, they are sold for the purpose of defraying expenses or repairing losses, which are themselves of the nature of general average, the loss arising from their sale gives a claim to a general average

Result of the authorities.

(g) *Dobson v. Wilson*, 3 Camp. 479. The action was brought by one owner of goods against another.

(h) *Dobson v. Wilson*, 3 Camp. 486.

(i) *Benecké, Pr. of Indem.* 271.

(j) *Stevens on Average*, 15, 5th ed. *Benecké, Pr. of Indem.* 261-275.

(k) So ordained by the 22d article of the Judgments of Oleron; see *Pardessus*, vol. i. p. 339, which in this respect is followed almost verbatim by the Laws of

Wisbuy, art. 39, (art. 44, of *Pardessus, Lois Maritimes*, vol. i. p. 480,) and the *Consolato del Mare*, cap. 105, of the Italian translation, 62, of *Pardessus*, vol. ii. p. 110. On this point these venerable laws still regulate the maritime practice of Europe. If the price of goods at the port of sale be higher than at the port of destination, the former is the sum at which they must be paid for. *Rinhardson v. Noasse*. 3 B. & Ald. 237.

General average losses—sacrifices for the common benefit.

contribution; the goods sold are considered as though they had been jettisoned, and are made good, as we shall presently have occasion to remark, upon precisely the same principles of contribution.¹

ART. 3. *Sacrifices of the Ship, or Part thereof, for the general Safety.*

Sacrifice of part of the ship for the common safety gives a claim to general average contribution.

894 *

If masts or spars, after being snapt or sprung by the wind, are afterwards cut away in order to save the ship and cargo, this is a general average loss.

Cables cut or anchors abandoned, to avoid an impending peril.

Cables cut, &c. to avoid loss of convoy.

§ 327. If part of the ship be sacrificed for the general safety, it is contributed for in general average. (l) Thus, *masts cut away, anchors heaved overboard, cables cut, guns and ships' stores jettisoned in order to save the whole adventure, are everywhere the subjects of general average contribution. (m)

If a mast be carried overboard by the wind, it is, of course, only a particular average loss; if, however, a mast or spar be snapt or sprung by the wind, and left hanging in the rigging, so that *in order to save the ship and cargo*, it becomes necessary to cut away entirely both the mast and the rigging, and throw both overboard, the damage caused by the act of so cutting them away is a general average loss, and is to be contributed for to the extent of the value of the mast and rigging, as they lay after the accident. (n)²

If cables are *cut* or anchors *abandoned*, in order to avoid any impending peril, as for the purpose of putting to sea in order to escape a lee shore in a gale of wind, this is a general average loss. (o)

Cables cut away or anchors slipped to avoid being separated from convoy are not the subject of general average

(l) Emerigon, chap. xii. sect. 41, vol. i. p. 606, ed. 1827. Mason, 298. Walker v. U. S. Ins. Co. 11 Serg. & Rawle, 61. }

(m) Code de commerce, art. 400, §§ 3,

4. Hamburgh Ord. tit. 21, art. 9, No. 7.

Prussian Code, § 1788. Stevens on Average, 13, 5th ed. < 3 Kent (5th ed.) 238.

Hennen v. Monro, 16 Martin, (Louis.)

449. Potter v. Prov. Wash. Ins. Co. 4

(n) Emerigon, chap. xii. sect. 41, vol. i.

p. 606, ed. 1827. Benecké, Pr. of Indem.

183. Stevens on Average, 15, 5th ed. 2

Phillips on Ins. 81.

(o) 2 Phillips on Ins. 87. 1 Magens,

345, case 27.

¹ See the case of *Giles v. Eagle Ins. Co.* 2 Metcalf, 140, cited and stated *post*, 910, in note; *Orrok v. Commonwealth Ins. Co.* 21 Pick. 460.

² See *Nickerson v. Tyson*, 8 Mass. 467.

contribution in this country (*p*) though they are so on the Continent. (*q*)

Where the ship, in order to avoid capture, or a lee shore, casts anchor in a foul and rocky bottom in some *unusual* place of anchorage, and the cable is consequently chafed asunder by the friction, or the anchor so firmly wedged that it cannot be weighed, it has been a subject of great discussion, especially among the German lawyers, whether the damage thus occasioned is a general average loss. It appears that in practice it is frequently adjusted as such (*r*); but on principle, as the damage thus incurred was not intended or anticipated *as the result of the act, as it was directly caused not by the agency and will of man, but by the force of the elements, it ought not to be considered a general average loss.

General average losses—sacrifices for the common benefit.

Loss incurred by anchoring in a foul bottom in an unusual place of anchorage.

* 895

If, in similar circumstances, the ship is compelled to cut her cable, from the impossibility of weighing the anchor, the loss thence arising will, it seems, be either general or particular average, according to circumstances: if cut in order merely to enable the ship to pursue her voyage, *and not under the pressure of any urgent peril*, it is particular average; if in order to prevent her drifting on a lee shore, or to avoid capture, it is general average: the reason being, that in the last case there is, and in the first there is not, an immediately impending danger to justify the sacrifice. (*s*)

If any part of the ship or her tackle be applied for the common benefit to some purpose different from its ordinary use, the loss thence arising is a general average loss (*t*), as if spars are cut up to construct a rudder, or sails and cordage used to stop up a leak. (*u*)

Loss arising from the appropriation of part of ship and tackle to an extraordinary purpose.

Thus, where, in order to prevent a ship which was lashed to the head of a harbor pier from being drifted thence by the fury of a storm, and sunk on the bar of the harbor, the master cut the cable of his best bower anchor, and with that fastened her to the pier, it was held that the damage thereby

(*p*) Stevens on Average, 14, 5th ed.

(*q*) Emerigon, chap. xii sect. 41, vol. i. p. 605, ed. 1827. Baldasseroni, tom. iv. p. 83.

(*r*) Weskett, tit. General Average, No. 5. Weijstein, § 8.

(*s*) Benecké, Pr. of Indem. 191. 2 Phillips on Ins. 82, 87.

(*t*) Stevens on Average, 15, 5th ed.

(*u*) 2 Phillips on Ins. 58.

General average losses — sacrifices for the common benefit.

Damage done to one ship in order to save another is a general average loss.

896 *

Sails let go to right a ship when on her beam ends give a claim to contribution.

Sails or spars carried overboard, and crowding a press of sail, do not.

done to the cable was a general average loss (*v*) ; and the decision was the same in a case, where the master, impelled by necessity, cut away his cable from the anchor to act as a hawser. (*w*)

If, with a view to the general safety of ship and cargo, it becomes necessary to damage and destroy another ship, or any part thereof, the loss thereby incurred must, it seems, be made good by a general average contribution. Thus, if a number of ships are lashed together, and one takes fire, and the crews of the others unite in scuttling the burning ship for the *safety of the rest the loss of the ship so sunk is said to be a general average loss to which all those saved thereby must contribute (*x*) ; and the law is the same if a crew, for the safety of their own ship, cut the cable of another. (*y*)

Sails, deliberately let go in order to right a vessel when she is on her beam ends, ought, on principle, to be made good by a general average contribution ; for the loss of the sails in such case is the direct, immediate, and intended result of extraordinary sacrifice made for the general safety as the only means of escape from imminent danger. (*z*)

But if sails or spars be carried away by the wind, in consequence of crowding sail to escape an enemy or a lee shore, this is not a general average loss in this country. A merchant ship had struck to a privateer, which, from the wind blowing fresh, was unable to board her : the merchantman, by hoisting an extraordinary press of sail, escaped, but, in so doing, was much strained and injured, and carried away her mainmast. The damage thus occasioned was held not to be a general average loss. (*a*)

The Cour Royale of Rennes, in the year 1822, came to the same decision in France with regard to sails carried away in attempting to escape a lee shore. Boulay-Paty cites both cases with approbation, and gives the true reason on which they are founded, viz., that these manœuvres form part of

(*v*) *Birkley v. Presgrave*, 1 East, 219.

(*w*) *Marshall v. Dutrey*, Select Cases of Evidence, 58.

(*x*) Casaregis, disc. 46. No. 45. Ordinanze di Bilbao, cap. 20, art. 21. See also Azuni, Diritto Marittimo, chap. iii. art. 2. vol. ii. p. 169. ed. 1795.

(*y*) 2 Phillips on Ins. 97.

(*z*) Mr. Benecké accordingly includes this among general average losses. Fr. of Indem. 185.

(*a*) *Covington v. Roberts*, 2 Bos. & Pull. N. R. 378.

those ordinary exertions to which the shipowner is bound by his duty to the freighters. (b) ¹

Upon the same principle it has been decided in England that *damage done to the ship by fighting* is not a subject of *contribution. Thus, where a merchantman (carrying, however, six guns) was attacked by a privateer, and, after a gallant resistance, beat her off, but had two of her men killed, several wounded, and received besides great damage from the enemy's shot, and expended a considerable quantity of ammunition, the court held that neither the expense incurred in curing the wounded sailors, nor the cost of repairing the damage so received, nor the waste of the ammunition so expended, was a subject of general average contribution. (c) Chief Justice Gibbs said, "the measure of resisting the privateer was for the general benefit, but it was no part of the adventure. No particular part of the property was voluntarily sacrificed for the safety of the rest (d); the loss fell where the chance of war directed it, and where, therefore, in point of justice, it ought to fall" (e): at Nisi Prius the same learned judge had said, "I cannot distinguish this from the case of a ship carrying a press of sail to escape an enemy." (f)

General average losses — sacrifices for the common benefit.

Damage done to a ship by fighting is not a general average loss.

* 897

Taylor v. Curtis, 6 Taunt. 608; 2 Taunt. Rep. 309.

With regard to a ship of war, indeed, it is obvious, that the damage caused by fighting is no more than an ordinary sea risk, — a loss caused by the perils insured against in the usual and ordinary course of the ship's duty as an armed vessel (g), and not an *extraordinary* measure resorted to for the general benefit; but with regard to a merchant vessel resorting to the measure of resisting a vessel of superior power as a desperate

Remarks on this case.

(b) Boulay-Paty on Emerigon, vol. i. p. 620. ed. 1827. There is also another reason why such losses should not be considered as giving the party who suffers by them a claim to general average contribution, viz. that the loss, though resulting from the measure adopted, was not its foreseen and intended consequence at the time it was resorted to; what the captain intended was, not to carry away his sails and spars, but only

to crowd sail and escape. He, in fact, HAZARDED his sails and spars, but did not SACRIFICE them.

(c) Taylor v. Curtis, 6 Taunt. 608. 2 Marsh. Rep. 309. S. C. 4 Camp. 334. Holt's N. P. 192.

(d) 6 Taunt. 623.

(e) 2 Marsh. Rep. p. 319.

(f) 4 Camp. 325.

(g) Emerigon, chap. xii. sect. 41. vol. i. p. 610. ed. 1827.

¹ Skiff v. Louisiana State Ins. Co. 6 Martin, (N. S.) 629.

General average losses — sacrifices for the common benefit.

and only means of saving both ship and cargo from capture, the loss thence arising appears, on principle, a fair subject for general average contribution: it is a loss which is the direct and anticipated result of an *extraordinary* measure resorted to as the only means of saving the whole adventure from imminent peril; and ought not, it should seem, to be regarded as falling within the scope of those ordinary duties of the navigation to which the owner is bound by his contract with the freighter. (*h*)

898 *

Loss of boats when it gives a claim to a general average contribution.

*Boats, when cut away from the ring-bolts, or other usual fastenings, and heaved overboard, are a general average loss (*hh*); but if cut away when lashed from the quarters or stern davits, it seems they would not be so, *unless an usage were proved in the trade so to carry them.* (*i*)

Damage done to the ship in order to save cargo from fire, &c.

Damage done to the ship, in order to extinguish the spontaneous combustion of part of the cargo, has been held, both in France and America, not to give a claim to contribution; as, *e. g.*, where a ship was scuttled, in order to extinguish the spontaneous combustion of a cargo of lime, it was held that the damage done to the ship gave no claim to contribution, on the ground that the measure was resorted to for the benefit of the ship only; for as to the cargo, the preservation of *that* was hopeless in any case, as, if the ship had not been scuttled, it would have been destroyed by fire, and upon her being scuttled would be destroyed by water. (*j*)¹

If, however, part of the ship be intentionally cut away and damaged, in order to come at or extinguish an accidental fire, which threatens the destruction both of ship and cargo, there can be no doubt that such damage gives a claim to contribution. (*k*)

(*k*) Mr. Stevens admits that there should be a distinction made between the two cases, but considers that even in the case of a merchant ship the loss so incurred would be not general, but particular average, (Essay on Average, 36. 5th ed.); though he acknowledges that many well-informed underwriters think it should be general average; it seems, on principle, that they are right.

(*hh*) Stevens on Average, 14. 5th ed. Benecké, Pr. of Indem. 187.

(*i*) Blackett v. Royal Exch. Comp. 2 C. & J. 244. See also † Lennox v. United States Ins. Comp. 3 John. Cases, 178.

(*j*) Emerigon, chap. xii. sect. 17, vol. i. p. 430. ed. 1827. † Crockett v. Dodge, 3 Fairf. [12 Maine.] Rep. 190.

(*k*) Stevens on Average, 42. 5th ed. Benecké, Pr. of Indem. 243.

¹ See Meech v. Robinson, 4 Wharton, 360.

ART. 4. *Voluntary Stranding for the General Benefit.*

§ 328. *Where the ship is voluntarily run ashore to avoid capture, foundering, or shipwreck, and is afterwards recovered so as to be able to perform her voyage,¹ the loss resulting from the stranding is to be made good by general average contribution.²* There is no rule more clearly established than this by the uniform course of maritime law and usage. Emerigon, who with his usual erudition exhausts all the learning that could be collected on the subject when he wrote, thus gives the result of the authorities he cites (l): "It sometimes happens that, in order to escape an enemy, or to avoid shipwreck, the ship is intentionally run aground in what appears to be the least dangerous spot. The loss thence arising is a general average loss, because its object was the general safety. (m)³

General average losses — sacrifices for the common benefit.

The loss arising from voluntary stranding, where the ship is afterwards got off, is a general average loss.

* 899

The rule has been laid down in the same way by Lord Tenterden in this country (n), and by Chancellor Kent in the United States (o), where it has received the sanction of several decided cases.

Mr. Stevens, though he admits all authority to be against him, maintains, that on principle this should not be a general

(l) These authorities are — Consolato del Mare, cap. 192, 193. (that is the 150th cap. of M. Pardessus; see *Lois Maritimes*, vol. ii p. 186.) *Roccus de Navibus*, note 62. *Targu*, cap. 76, p. 317. *Casaregia*, disc. 19. No. 18. *Disc.* 46. No. 61.

(m) Emerigon, chap. xii. sect. 13. vol. i. pp. 405. 600. ed. 1827.

(n) Abbott on Shipping, 349. 5th ed. 6th Am. ed. 490, et seq. }

(o) † In the case of *Bradhurst v. Columbian Ins. Comp.* 9 John. Rep. 9. See also the other cases cited in 2 Phillips on Ins. pp. 110 — 114.

¹ As to this point, see *Reynolds v. Ocean Ins. Co.* 22 Pick. 191, cited *post*, 900, in note.

² *Reynolds v. Ocean Ins. Co.* 22 Pick. 191; 3 Kent, (5th ed.) 239; Abbott, Ship. (6th Am. ed.) 490, in note. If it appears that the ship would have gone ashore at all events, it is no case for general average. *Meech v. Robinson*, 4 Wharton, 360; *ante*, 863, in note. When a vessel is stranded, and part of the cargo is taken on shore and conveyed to the place of destination by land, the vessel is afterwards recovered, and other parts of the cargo reshipped and carried to the port of destination, the owners of the cargo landed and conveyed by land, are bound to contribute to the extra charges and expenses incurred by the master, *after the landing of such cargo*, as general average. The rule of equity, reciprocity, and equality, requires it. *Bevan v. Bank of United States*, 4 Wharton, 301.

³ 3 Kent, (5th ed.) 233, 234, 239; *Sims v. Gurney*, 4 Binney, 513.

General average losses—
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common benefit.

average loss, chiefly on the ground that the object in view is not the *general safety of the whole adventure*, but only the safety of the cargo purchased by the destruction of the ship. (*p*)

Mr. Benecké, on the other hand, acknowledges, that, in every case but one, the loss arising from voluntary stranding has all the characteristics of a general average loss—“imminent danger, voluntary determination, and a sacrifice (*q*):” but in the excepted case, *viz. where the situation of the ship at the time of the loss is so desperate as to leave no alternative*, he thinks the loss is not properly general average, *because the stranding was inevitable, and therefore not voluntary*.

To the objection of Mr. Stevens it is a sufficient answer that the intention is not to destroy the ship, but to place both her and the cargo in a situation of less peril, and that the loss is therefore voluntarily incurred for the common benefit.

900*

* The objection of Mr. Benecké, in the case supposed by him, though at first sight plausible, disappears on closer examination. If, indeed, the act of stranding be in *no degree* the result of human agency, then, of course, *cadit questio*: but if the will of man was in any, even the least, degree contributory thereto, that is all which is required; and it makes no difference that the pressure of circumstances was such as to prevent that will from being reasonably exerted, except in one particular way. * This forced volition (“*volonta violentata dall' accidente del pericolo*”) (*r*) is all that is required to give the party making the sacrifice a claim to contribution. Nothing more is requisite than that the act of man should have coöperated with the violence of the elements. (*s*)

(*p*) Essay on Average, 34, 35. 5th ed.

(*q*) Benecké, Pr. of Indem. 219.

(*r*) Targa, as cited by Emerigon, chap. xii. sect. 42. vol. i. p. 568. ed. 1827.

(*s*) “Que le fait de l'homme ait concouru avec le cas fortuit.” Emerigon, chap. xii. sect. 42. vol i. p. 568. ed. 1827. The case, in fact, exactly falls within that class of actions which the scholastic philosophy designated as *mixta*, i. e. rather voluntary than involuntary, though partaking of the nature of both. Thus Aris-

totle, in treating of the question of free-will, expressly instances jetisons (*τὰς ἐν τοῖς χειμῶσιν ἐξβολὰς*) as falling within the class of actions that ought rather to be called voluntary than involuntary, because, although no one would resort to them unless forced by circumstances, yet they are objects of choice at the time they are resolved on, and the necessary steps taken towards carrying them into effect are acts of free volition. Ethics, lib. iii. chap. 1.

In practice the rule may be regarded as established in our own country, and though the point has never been expressly decided in our courts, there can be little doubt that they would hold in conformity with the great body of previous authorities, that, at all events, where the ship is subsequently recovered, after a voluntary stranding, so as to be able to pursue her voyage, the loss arising therefrom gives a claim to a general average contribution.¹

General average losses—sacrifices for the common benefit.

Where, however, *the ship is lost* in consequence of the stranding, but *the cargo saved*, does that which is so saved contribute in general average for the loss of the ship?

Where the ship is lost by the voluntary stranding, but the cargo saved, is there any contribution?

This is a question on which there has been a great diversity of opinion among legislators and jurists. (t) The Roman law provided generally that the goods saved should not contribute for the loss of the ship. *Anissae navis damnum collationis consortio non sarciantur per eos qui merces suas naufragio liberaverint.* (u) Voet, however, in commenting on this passage, expressly says, "That if the ship be *voluntarily* run ashore for the common safety, and *thus has perished*, the goods being saved, contribution is due." (v)

* 901

The Consolato del Mare (w), in case of the ship's being wrecked (*brisé*) by the voluntary stranding, provides that the goods saved shall contribute for the damage done to the ship.

The case is not expressly provided for by the other medieval sea-laws.

Emerigon, after laying down the general doctrine that in

(t) See an elaborate account of the state of the question in Pardessus, *Lois Maritimes*, vol. i. p. 140, and vol. ii. p. 21. See chap. xii. Introduction to the Consolato del Mare.

(u) Dig. lib. xlv. tit. 2. l. 5.

(v) Voetius ad Pandect, *loc. cit.*

(w) Cap. 192. of the Italian translation; cap. 150. of the Catalan original. Pardessus, *Lois Maritimes*, vol. ii. p. 167.

¹ The expense of getting off a vessel thus voluntarily stranded or run on shore for the common benefit is a subject of general average, and this without regard to the consideration, whether the voyage is resumed, or the cargo again taken on board or not. *Reynolds v. Ocean Ins. Co.* 22 Pick. 191. So, where a ship was accidentally stranded, within a few miles of her destination, and by labor and expense was set afloat again, and completed her voyage, the whole expenses were held to constitute a general average to be contributed for by the property saved by them. *Bedford Com. Ins. Co. v. Parker*, 2 Pick. 1. See *Giles v. Eagle Ins. Co.* 3 Metcalf, 140, cited and stated post, 910, in note. In regard to expenses incurred for the common benefit, the long established doctrine is, says Mr. Phillips, that disbursements for the common safety, must be reimbursed in general average, whether the ship and cargo are eventually saved or not. 2 Phil. Ins. 114; *Spafford v. Dodge*, 14 Mass. 66; post, 933.

General average losses — sacrifices for the common benefit.

case of voluntary stranding the goods saved contribute for the damage done to the ship, adds to it this limitation, "Provided always that the ship shall have been set afloat again; for if the stranding be followed by the wreck of the ship, it is then *saufve qui peut*." (x)

Bynkershoek disapproves of this doctrine, and holds that the loss of the ship, like the loss of her tackle, is a general average loss, where she has been sacrificed by a voluntary stranding for the common safety. (y)

Law as finally settled in the United States by the case of *Columbian Ins. Comp. v. Ashby and Stribling*, 13 Peters' Supreme Court Rep. 331.

The question has frequently been before the American courts, and for some time was variously decided there, until it was finally set at rest by the judgment of Mr. Justice Story, in the case of the *Columbian Insurance Company v. Ashby* (z), in which that very distinguished person, after examining all the learning on the subject from the Digest downwards, decided that a voluntary stranding, followed by a total loss of the ship, but with a saving of the cargo, constitutes, when designed for the general safety, a clear case of general average, in which the owners of the cargo are liable to contribute for the loss incurred by the ship and freight. (a)

902*

The facts of the case were these: — The brig *Hope*, going down Chesapeake Bay, found the weather too bad to proceed to sea, and bore away for a projecting headland in the Bay, called Sewell's Point, where she anchored. On the second and following day the gale increased in violence; the brig dragged her anchors from time to time, till finally she struck on the shoals, and, her head swinging round, brought her broadside to the wind and a heavy sea. In this situation the captain, finding no other possible chance of saving the ship and cargo, and preserving the lives of the crew, slipped his cables altogether, and ran the brig ashore, as far up the

(x) Emerigon, chap. xii. sect. 41. vol. i. p. 600. ed. 1827.

(y) *Questiones Privati Juris*, lib. iv. c. 22.

(z) † 13 Peters, (S. C.) Rep. 331.

(a) Chancellor Kent, who as a judge had elaborately expressed a different opinion (in the case of *Bradhurst v. Columbian Ins. Company*), in the last edition of his Commentaries, states the law to have been finally settled in the United States by the judgment of Mr. J. Story. See 2

Kent, Comm. (5th ed.) 239, note. { Abbott, Ship. (8th Amer. ed.) 490, note. Caze v. Reilly, 3 Wash. C. C. 298. Gray v. Wain, 2 Serg. & Rawle, 229. Walker v. U. S. Ins. Co. 11 Serg. & Rawle, 61. Scudder v. Bradford, 14 Pick. 13. Mutual Safety Ins. Co. v. Cargo of ship George, Dist. Ct. South Dist. N. York, Adm. 8 Law Rep. 361. S. C. New York Legal Observer for 1845, p. 280. 2 Phil. Ins. 101. Meach v. Robinson, 4 Wharton, 380. }

beach as possible, where, after the storm, she was left high and dry, and there was no possibility of getting her off. The cargo was saved. The court held that the owners of the cargo were bound to contribute to the owners of the ship and freight for the loss upon both interests caused by the stranding.

General average losses — sacrifices for the common benefit.

In the course of his very elaborate judgment, Mr. J. Story thus states succinctly the grounds of his decision: — “The intention is not to destroy the ship, but to place her in less peril, if possible, as well as the cargo. The act is hazardous to the ship and cargo, but is done to escape from a more pressing danger; it is done for the common safety; and if the salvation of the cargo is accomplished thereby, it is difficult to perceive why, because, from inevitable calamity, the danger has exceeded the expectation or intention of the parties, the whole sacrifice should be borne by the shipowner, when he has thereby accomplished the safety of the cargo.” (b)

*The point has never presented itself for judicial decision in this country. Should it arise, the principles established in the judgment just referred to would, no doubt, have their due weight in determining the mind of the court.

* 903

SECT. III. *General Average Losses — Extraordinary Expenditures for the common Benefit.*

§ 329. Having enumerated those cases of general average loss which arises out of SACRIFICES, we will now proceed to consider those which are founded on EXPENDITURES.

General average losses — extraordinary expenditures for the common benefit.

As we have seen by the principles already developed in the second section, there are two main questions to be asked in order to ascertain whether any given *expenditure*, made in the course of the voyage, ought to give a claim to contribution in general average.

Principles upon which expenditures give a claim to contribution.

1. Was it of an *extraordinary* nature? In other words, was it any thing more than one of those ordinary disbursements of the voyage which are necessary for keeping the ship in a

(b) This case is well worth consulting it, will find the judgment of Mr. J. Story in the original report. Those, however, given at length by Mr. Phillips. Ins. vol. who have not the means of so referring to it. pp. 111-114.

General average losses — extraordinary expenditures for the common benefit.

proper condition to transport the cargo, and which the owner of the goods has therefore a right to demand of the owner of the ship, without being called on to contribute towards their payment?

2. Even supposing the expenditure to have been of an extraordinary nature, was it also incurred for the joint benefit of both ship and cargo?

If the answer to both these questions be in the affirmative, the *expenditure* ought, on principle, to be made good to the party who has incurred it by those who have benefited by it: in other words, should be regarded as a general average loss.

If the answer be in the negative, then the expenditure will either come under the head of those *petty averages* which the shipowner himself must bear without any claim on his underwriter, or they are particular average losses, which fall ultimately on the underwriter on the ship, or on freight.

904 *

*By the application of these principles we may ascertain whether any given expenditure ought to give a claim to compensation in general average; and wherever practice or positive law have not clearly established the contrary, these principles must be the sole guide of decision.

ART. 1. *Expenses of entering or quitting a Port of Distress, to refit, and of discharging and reloading Cargo there.*

All expenses necessarily connected with making a port to refit are general average, when the damage which compels the ship to put in is the result either of general average or particular average losses.

§ 330. From these principles it clearly follows that where a ship has either cut away her masts or rigging, or has been so damaged by a storm, that it is necessary, for the safety both of the ship and cargo, to put into some port out of the course of the voyage insured for repairs, all the expenses *inseparably* connected with the act of first putting into and afterwards clearing out of such port of distress give the shipowner a claim to a general average contribution; and this upon the plain ground that these expenses are a *necessary* consequence of an extraordinary measure taken for the general preservation. (c)

Accordingly, all port dues, and charges of all sums paid

in remuneration of services rendered in bringing the ship into port, and in clearing her out again, come into general average.

General average losses—extraordinary expenditures for the common benefit.

Thus, pilotage (*d*), towage of a disabled ship into port (*e*), charges of taking off anchors and cables, and rendering assistance generally (*f*),¹ wages of people employed to guard property during the repairs (*g*), or of cutting a way for the ship through the ice when she has become frozen up in a port of distress (*h*), and all charges of a similar kind, are contributed for in general average, provided the ship put into port, in consequence either of sea damage, or to repair purposely inflicted losses.

* 905

*But it must be carefully borne in mind, that none of the above charges can be allowed in general average, when the ship is obliged to put in merely in consequence of contrary winds, or for the purpose of procuring water and provision; in such cases these expenses fall under the head of petty averages, and must be borne by the shipowner alone. (*i*)

But when obliged to put in in consequence of shortness of provisions, &c., the expense of putting in, &c., is a petty average.

§ 331. All the expenses necessarily incurred in preparing for the refitment of the ship in the port of distress give a claim to general average contribution.²

Expenses of unloading and reloading cargo are general average when for the joint benefit of ship and cargo.

Thus, when in order to repair the ship it becomes absolutely necessary to discharge the cargo, all the expenses of unloading, warehousing, and reloading it, come into general average, because incurred for the joint benefit both of the ship and of the cargo; of the ship, that she may be repaired,

(*d*) Benecké, Pr. of Indem. 192. Stevens on Average, 23, 5th ed.

(*h*) 2 Phillips, Ins. 117. Benecké, Pr. of Indem. 214.

(*e*) 2 Phillips, Ins. 115.

(*i*) Stevens on Average, 23, 5th ed.

(*f*) Stevens on Average, 23, 5th ed.

Benecké, Pr. of Indem. 192. { See Wightman v. Macadam, 2 Brevard, 230. }

(*g*) Ibid.

¹ The wages of extra hands, hired to assist in pumping the ship while she is making a port of necessity for repairs, should be contributed for in general average. *Orrick v. Commonwealth Ins. Co.* 21 Pick. 469, 470. Per Putnam, J. See *Sewall v. United States Ins. Co.* 11 Pick. 92.

² The survey, to ascertain the necessity and extent of repairs at a foreign port, may be ordered by the court of admiralty, or by the American consul, or by persons voluntarily appointed by the master, and if the damages were the result of a peril insured against, the underwriters bear the expense of the survey. *Potter v. Ocean Ins. Co.* 3 Sumner, 27, 42; ante, 844, note.

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and of the *cargo*, that it may be preserved. (j)¹ It must be, however, carefully borne in mind, that it is only when these charges are necessarily incurred for the sake of the ship, as well as of the cargo, that they can be allowed to give a claim to contribution. If the cargo were merely unloaded, in order to preserve it, in cases where the ship might have been equally well repaired without its removal, the expense thus caused would not constitute a general average claim. (k)²

So, the charge of removing the ship's stores, *after the cargo is out of her*, is not allowed to give such claim, being an expense incurred for the sake of the ship only. (l)

906 * *ART. 2. *Expense of the Repairs actually done to the Ship in her Port of Distress.*

The cost of the repairs themselves, when caused by accidental damage, can give no claim to contribution.

§ 332. The expenses just mentioned are admitted to give a claim to general average contribution, quite irrespective of the *nature of the damage* which made it necessary for the ship to put in for repair, upon the plain principle that they are the necessary consequences of an extraordinary step taken for the general benefit: it is manifest that the same principle does not apply to the *expense of the repairs themselves*, for that expense is a consequence, *not of the putting in to refit, but of the foregoing loss*. On principle, therefore, the question whether the expense of repairs should come into general average, would depend entirely on the nature of the loss

(j) Stevens on Average, 21, 22, 5th ed. Benecké, Pr. of Indem. 193. Mr. Benecké, indeed, seems to doubt whether these charges ought ever to come into general average; but on principle, it seems, they ought, and they are admitted in practice. See also 3 Kent's Comm. (5th ed.) p. 239. Accordingly these charges were allowed in the case of *The Copenhagen*, 1 Rob. Adm. Rep. 298. In *Plummer v. Wildman*, Le Blanc, J. says, "The unloading may be general average if it were necessary in order to repair the ship." 3 Maule & Sel. 487.

(l) Stevens on Average, 22.

(k) Stevens on Average, *quod supra*.

¹ See *Barker v. Phoenix Ins. Co.* 8 John. 307; *Bedford Com. Ins. Co. v. Parker*, 2 Pick. 1, 8; *Thornton v. U. S. Ins. Co.* 12 Maine, 150; 3 Kent, (5th ed.) 236; *Walden v. Le Roy*, 2 Caines, Rep. 263; *Ins. Co. v. Fitzhugh*, 4 B. Munroe, 160. But the labor and board of the master and crew, in relieving a vessel cast ashore in a storm, are not the subject of general average, or chargeable to the insurer. *Giles v. Eagle Ins. Co.* 2 Metcalf, 140, cited *post*, 910, in note.

² *Ins. Co. v. Fitzhugh*, 4 B. Munroe, 160.

which rendered such expense necessary. If the damage to be repaired were in itself a general average loss, the cost of repairing it might be so too; but the cost of repairing damage *accidentally caused to the ship by the perils of the sea*, can never, on principle, give a claim to contribution, for to pay the cost of such repair is a duty imposed on the captain by the very contract of affreightment, whereby he has pledged himself to maintain the ship in a fit state for transporting the cargo to its place of destination; and of this duty the shipper of the goods has a right to demand the fulfilment, without contributing to the expense. (m)

General average losses — extraordinary expenditures for the common benefit.

Accordingly we find, even in the Digest itself, an express decision that the expense of such repairs can give no claim to general average (n); and the greatest of all writers on insurance law lays it down, without any limitation, that if a ship, being unable to keep the sea, puts into port in order to repair the damage done to her by a storm, *the expense of the repairs themselves* ought not to be the subject of general average contribution. (o)

Authorities on the point.

* 907

It is surprising, indeed, that there should ever have been any doubt upon a matter which on principle is so plain, as that the owner of the ship is bound to keep the ship in repair, and consequently to repair at his own cost all damages accidentally done to her in the course of the voyage. (p)

The doubt which has arisen upon the point in this country and America seems principally to have been caused from a misconception of the following case: —

Rule supposed to be established by Plummer v. Wildman, 3 M. & Sel. 482.

A ship in the prosecution of her voyage met with a particular average loss by fouling, in consequence of which she was obliged to *cut away part of her bowsprit rigging* (a general average loss); she was so much damaged by the effects of the accident and the cutting away, that she could not keep the sea, nor pursue her voyage without repairs, and she accordingly put into port to refit: the court held, that the expense of such repairs as were absolutely necessary to enable

(m) Boulay-Paty, Comment. on Emerigon, vol. i. p. 628. ed. 1827. Benecké, Pr. of Indem. 194.

(n) Dig. lib. xiv. tit. 2. f. 6. The case was thus: a ship, bound for Ostia, having been damaged by tempest, put into the port of Hippo to refit; it was decided

that the owners of the cargo could not be called upon to make good to the ship-owner the loss so incurred.

(o) Emerigon, chap. xii. sect. 41, § 6. vol. i. p. 608, ed. 1827.

(p) Stevens on Average, 40, 5th ed.

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the ship to prosecute her voyage, and were of no permanent benefit to her, might come into general average, but no farther. (q)

Lord Ellenborough in this case said, that the main question to be considered was, not so much the nature of the accident which made the repairs necessary, as "whether the effect produced was such as to incapacitate the ship from further prosecuting her voyage, unless she returned to port and removed the impediment;" — "as far as removing this incapacity is concerned, all are equally benefited by it, and therefore it seems reasonable that all should contribute towards the expense of it; but if any benefit ultra the mere removal of the incapacity should have accrued to the ship by the repairs done, inasmuch as this will redound to the particular benefit of the shipowner only, it will not come under the head of general average." (r)

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* From these expressions of Lord Ellenborough it was not unfairly inferred, that the rule established by *Plummer v. Wildman* was this, *that the expense of repairs done to a ship in a port of distress, in as far as they are no more than just sufficient to enable the ship to keep the sea till she completes her voyage, and are of no permanent benefit to the ship ultra that purpose, give a claim to general average contribution, quite irrespective of the nature of the loss which induced the necessity of repairing.*

Accordingly this is the rule now adopted on the subject in the United States (s)¹: it is evidently opposed to the general principles above laid down; in theory, it is not easy to perceive on what ground the necessity of the repairs should entitle them to be paid for in general average, and in practice it would obviously be very difficult to discover any kind of repairs which would not be of some benefit to the ship. (t)

In this country, in fact, the case of *Plummer v. Wildman* must either be considered to be overruled, or, at all events,

The facts of the case of *Plummer v. Wildman* do not support the rule supposed to be founded on it.

(q) *Plummer v. Wildman*, 3 Maule & Sel. 482.

(r) *Ibid.* 486, 487.

(s) 3 Kent's Comm. (5th ed.) 236. 2 Phillips on Ins. 115.

(t) Benecké, Pr. of Indem. 197. 2 Phillips on Ins. 115.

¹ *Brooks v. Oriental Ins. Co.* 7 Pick. 259, 267, 268, follows *Plummer v. Wildman*; *Saltus v. Com. Ins. Co.* 10 John. 487.

not to be an authority for the rule thus deduced from it: the facts of the case, it must be observed, do not authorize such an inference; for a portion of the damage to repair which the ship had put into port, viz. the cutting away the bowsprit rigging was undoubtedly a general average loss: accordingly, in a more recent case, Lord Ellenborough himself refers to *Plummer v. Wildman*, as decided on the ground that the repairs in that case were rendered necessary by a *sacrifice of part of the ship for the general safety*; and in this latter case he plainly intimates, *that the expense of repairs can only be a subject of general contribution when rendered necessary by a general average loss.* (u)

General average losses — extraordinary expenditures for the common benefit.

The facts of the case now referred to are as follows: — the bowsprit bitts of a ship, then under courses, and beating to windward, having given way in consequence of her violent laboring in a heavy and dangerous sea, the master, finding it necessary for the ship's safety so to do, after consultation *with his officers, put into port to refit. The expenses of repairing the bowsprit, together with the wages and provisions of the crew, during the time necessarily occupied in the repairs, were claimed as the subject of a general average contribution: Lord Ellenborough and the whole court held, that neither could be allowed. (v)

And the supposed rule is inconsistent with the latter case of *Power v. Whitmore*, 4 Maule & Sel. 141.

* 909

Rule as laid down by Lord Ellenborough in *Power v. Whitmore*, 4 M. & Sel. 141.

Lord Ellenborough, in giving judgment in this case, says, in unqualified terms, "that general average must lay its foundation in a *sacrifice of part for the sake of the rest*; but here was no sacrifice of any part by the master, but only of his time and patience, and the damage incurred was by the violence of the wind and weather." (w)

This language of his lordship is certainly inconsistent with that which he is reported to have employed in *Plummer v. Wildman*; and the rule supposed to be founded on that case is clearly irreconcilable with the principles upon which he decided in *Power v. Whitmore*. This latter case, indeed, appears to have restored the law in England upon this subject to that which on principle seems the true rule, viz. *That the expense of repairs rendered necessary by particular average losses sustained by the ship can never give a claim to a general*

(u) *Power v. Whitmore*, 4 Maule & Sel. 149.

(v) *Power v. Whitmore*, 4 Maule & Sel. 141.

(w) *Ibid.* 149.

General average losses—extraordinary expenditures for the common benefit.

*average contribution, but that such claim can only be sustained when the damage to be repaired was in itself a general average loss. (1010)*¹

ART. 3. Wages and Provisions of Crew during Delay for the Purpose of Repairs.

Wages and provisions of the crew during delay to refit are not in this country either general or particular average.

§ 833. These expenses follow the same rule in this country as the expenses of the repairs themselves; they are not brought into general average when the repairs which cause the delay are rendered necessary by particular average losses. (x)

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*In England, in fact, these expenses can give a claim neither to general nor to particular average, but fall exclusively upon the shipowner, upon the principle that he is bound by the very contract of affreightment, and as part of the consideration for which freight is paid him, to keep a competent crew on board from the commencement to the end of the voyage. (y) The labor of the sailors, says Boulay-Paty, while the ship is repairing, and their wages and provisions while so occupied, form part of those expenses and

(1010) *Benecké, Pr. of Indem.* 196-198. If indeed the expense of repairs is much higher at the port of distress than it would be elsewhere, and the ship in consequence would not have gone in to repair *but for the sake of the cargo*, it seems, that in such case the *surplus* cost of the repairs might be admitted to give a claim to contribution. 3 Kent's Comm. (5th ed.) 236.

(x) See *Jackson v. Charnock*, 8 T Rep.

209. *Plummer v. Wildman*, 3 Maule & Sel. 482. *Power v. Whitmore*, 4 Maule & Sel. 141, in all which these charges were claimed in general average and disallowed.

(y) See *Lateward v. Curling*, Park, 115, 8th ed. *Eden v. Poole*, *ibid.* *Robertson v. Ewer*, 1 T. Rep. 139, confirmed by the recent case of *De Vaux v. Salvador*, 4 Ad. & Ell. 420.

¹ *Padelford v. Boardman*, 4 Mass. 548. In reference to the cases of *Plummer v. Wildman*, and *Power v. Whitmore*, Mr. Chancellor Kent says, the result of these decisions "is, that where the general safety requires a ship to go into port to refit, by reason of some peril, the wages and provisions of the crew during the detention are not the subject of general average; but the other necessary expenses of going into port, and of preparing for the refitting the ship, by unloading, warehousing, and reloading the cargo, are general average. The costs of the repairs, so far as they accrue to the ship alone as a benefit, and would have been necessary in that port, on account of the ship alone, are not average. Yet, if the expense of the repairs would not have been incurred but for the benefit of the cargo, and might have been deferred with safety to the ship, to a less costly port, such extra expense is general average." 3 Kent, (5th ed.) 235, 236. See also the remarks upon these cases, in *Abbott, Ship.* (6th Am. ed.) 494 to 499, and 498, in note.

exertions to which the shipowner is bound by the relation in which he stands to the owner of the goods. (z)

In one English case, indeed, where a ship put in to refit, in consequence of a *particular average loss*, and the crew were *discharged* immediately on her entering the port of distress, but afterwards hired by the master, to work at the repairs, *not as sailors*, but as common laborers, it was held that their wages and provisions during the delay to refit might be brought into general average. (a)¹

General average losses — extraordinary expenditures for the common benefit.

Da Costa v. Newenham seems opposed to this.

The court, however, put their decision entirely on the ground that the men had been discharged on making the port, and were afterwards employed, not as sailors, but as common laborers (b), so that the cost of employing them might be considered rather as an extraordinary expenditure than one falling within the ordinary scope of the shipowner's duty. It may, however, as Mr. Stevens remarks, be very reasonably doubted whether the master, by so discharging his crew on making for a port of distress, and then rehiring them, can, on true principles, be considered as giving the shipowner a claim to general average for their wages and provisions while employed on the repairs. (c) There is nothing in the fact of putting into a port of distress to discharge *the contract of affreightment*, and while that still remains entire the master is not released from the obligation it imposes on him of keeping and paying a competent crew throughout the whole course of the voyage.

Explained.

* 911

(z) Boulay-Paty, on Emerigon, vol. i. p. 610, ed. 1927.

(b) See the judgment of Ashurst, J. 413.

(a) Da Costa v. Newenham, 2 T. Rep. 407.

(c) Stevens on Average, 40, 5th ed.

¹ See *Giles v. Eagle Ins. Co.* 2 Metcalf, 140, 143, 144. In this case a vessel was insured in the coasting trade and back and forth one or more fishing voyages, the insurers to be liable for general average, however small. The vessel went ashore in a storm, and the crew boarded on shore, and board was paid for them, but they were not dismissed from the vessel. By the labor of the master and crew, and the labor of others who were hired for the purpose, the vessel was got off and fitted to sail, and she returned to her home port. Part of the outfits of the vessel were sold by the master, at the place where she went ashore, to raise money to pay for getting her off, &c. he having no other means of raising money for that purpose. Under these circumstances, the court decided that the labor and board of the master and crew, while getting off the vessel, were not a general average, and that the insurers were not liable therefor; but that they were liable for the labor, &c. of the persons hired to assist the master and crew, and for the loss on the sale of the outfits — these being a general average. *Giles v. Eagle Ins. Co.* 2 Metcalf, 140.

General average losses — extraordinary expenditures for the common benefit.

Where the damage itself is of the nature of general average, these charges are so also.

Law in the United States.

Where, however, the damage to be repaired is itself such as to give a claim to contribution, then these expenses also should, on principle, be brought into general average, as being consequences immediately resulting from the measure adopted for the general preservation (*d*); and, accordingly, Lord Tenterden considers that, in such case, they would possibly be held to be general average in this country. (*e*) The rule of the French code is, that these expenses are general average, provided the loss to be repaired was voluntarily incurred for the common benefit, and the ship freighted by the month. (*f*)

In the United States these expenses are in all cases alike brought into general average (*g*);¹ and on the continent they

(*d*) Benecké, Pr. of Indem. 205.

(*e*) Abbott on Shipping, part iii. chap. viii. § 7, p. 350, 5th ed.

(*f*) Code de Commerce, art. 400, § 6. The reason given by the French jurists for this last restriction, is, that, where the ship is *freighted by the month*, the shipowner receives no freight for the period of detention, and is therefore not bound by his duty as shipowner to pay or provision the crew during the delay; so that the expense caused by doing so is in such case of an extraordinary nature. On the other hand, where the ship is freighted by

the voyage, freight is due for the whole period of detention (which is included in the voyage,) and the wages and provisions of the crew are, in such case, an ordinary expenditure to which the shipowner is bound. Pothier, Traité des Charte-Parties, No. 85. Mr. Benecké considers that when the loss to be repaired was *voluntarily* incurred, the expense of wages and provisions should be general average in either case. Pr. of Indem. 206.

(*g*) 2 Phillips on Ins. 120. 3 Kent, (5th ed.) 235, note (*a*).

¹ As stated in the text, in the United States, the rule seems definitively settled in our principal commercial States, that whatever be the nature of the injury, whether arising from a voluntary sacrifice, or a mere peril of the sea, the wages and provisions of the crew from the time of putting away for the port of distress to refit, and every other expense necessarily incurred during the detention for the benefit of all concerned, are to be contributed for as general average. *Padelford v. Boardman*, 4 Mass. 548; *Clark v. United Marine and Fire Ins. Co.* 7 Mass. 365; *Walden v. Le Roy*, 2 Caines, Rep. 263; 3 Kent, (5th ed.) 235, 236, 302, 303; *Bixby v. Franklin Ins. Co.* 3 Sumner, 46, in note; *Thornton v. U. S. Ins. Co.* 12 Maine, 150; *Dunham v. Com. Ins. Co.* 11 John. 315; *Brooks v. Oriental Ins. Co.* 7 Pick. 259; *Peters v. Warren Ins. Co.* 3 Sumner, 400; *Spafford v. Dodge*, 14 Mass. 74; *Henshaw v. Mar. Ins. Co.* 2 Caines, R. 264; *Barker v. Phoenix Ins. Co.* 8 John. 307; *Jones v. Ins. Co. of N. Amer.* 4 Dallas, 246; *Ross v. Ship Active*, 2 Wash. C. C. 226; *Sage v. Middletown Ins. Co.* 2 Conn. 239; *Abbott, Ship.* (6th Am. ed.) 498, in note; *Potter v. Ocean Ins. Co.* 3 Sumner, 27. In this last case, it was decided, that the wages, provisions, and other expenses of the voyage to a port of necessity, for the purpose of making repairs, constitute a general average. It was also held in the same case, that it makes no difference in the application of the principle to policies of insurance, that there happens to be no cargo on board, so that there is, in fact, no contribution to be made by cargo or by freight, for general average does not depend upon the point, whether there are different subject matters to contribute, but whether there is a common sacrifice for the

are generally admitted to be such, although there is hardly any point, even in the perplexed doctrine of general average, in which there is such a great diversity in the positive laws of mercantile states. (*h*)

General average losses — extraordinary expenditures for the common benefit.

*ART. 4. *Expenses incurred in reclaiming captured Property during detention by Embargo.*

* 912

§ 334. When a neutral, or other ship, has been seized and carried into port for adjudication, the wages and provisions of the crew during their delay in such port for the purpose of reclaiming the captured property, seem to be a general average charge, if incurred for the joint benefit of both ship and cargo, that is, in other words, when both ship and cargo are the subject of detention (*i*):¹ but if either the ship alone, or the

Wages and provisions, &c. during delay to reclaim captured or detained property, are general average, if the delay be for the joint benefit of both ship and cargo.

(*h*) Mr. Bencké, in his *Principles of Indemnity* (p. 191–207,) has with infinite learning collected and commented on all the various laws of the European states on this subject.

(*i*) Riccard, *Négoc. d'Amsterdam*, p. 279, cited in Emerigon, chap. xii. sect. 41. vol. i. p. 613, ed. 1827. 1 Magens, 69. § 57. 3 Kent's Comm. (5th ed.) 236.

benefit of all who are, or may be, interested in the accomplishment of the voyage. Neither does it make any difference in the application of the principle, that the insurance, on which the question arises, is not for a particular voyage, but on time. *Potter v. Ocean Ins. Co.* 3 Sumner, 27. But in *Gazzam v. Cincinnati Ins. Co.* 6 Ohio, 73, it was held, that in a policy on time, the insurer on time was not liable for the wages of the crew, while the vessel is stranded within the time. The wages were considered to be the ordinary expense. See *Perry v. Ohio Ins. Co.* 5 Ohio, 306; *Webb v. Protec. Ins. Co.* 6 Ohio, 456. So, in *Giles v. Eagle Ins. Co.* 2 Metcalf, 140, cited in note to *ante*, 910. And in *Williams v. Suffolk Ins. Co.* 3 Sumner, 510, the expenses and charges of going to a port of necessity to refit were held properly to be a general average, only when the voyage has been or might be resumed. But the doctrine does not apply if the voyage has been abandoned from necessity. Nor are the wages and provisions of the ship's crew to be regarded as general average, while the ship is repairing, after she has arrived at her port of destination, and delivered her cargo. *Dunham v. Commercial Ins. Co.* 11 John, 315. Nor where the ship has been forced into a port short of that of her destination, by stress of weather, and during delay for repairs. *Wightman v. Macadam*, 2 Brevard, 230.

See *Leavenworth v. Deafield*, 1 Caines, 574; *Kingston v. Girard*, 4 Dallas, 274; *Peany v. New York Ins. Co.* 3 Caines, 155; *Hartin v. Phoenix Ins. Co.* 1 Wash. C. C. 400. But see *Spafford v. Dodge*, 14 Mass. 66, which is *contra*. The expenses incurred after capture in reclaiming the ship and cargo, and procuring restitution, are to be charged and allowed as a general average. *Spafford v. Dodge*, 14 Mass. 66; *Dow v. Union Ins. Co.* 8 Mass. 494. And so indeed all other expenses for the preservation of the ship and cargo during the time of such detention necessarily incurred. *Ib.* *Speyer v. N. York Ins. Co.* 3 John, 89; *Jumel v. Mar. Ins. Co.* 7 John, 412. So, also, money, *bonâ fide*, paid as a ransom in such case to procure a

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cargo alone, be the cause of detention, the charges of reclaiming them are a particular average loss to the owner of the property on whose account they were incurred. (*j*)

The following case, decided in the United States, affords a good illustration of this principle:—An American (neutral) ship was seized by the French, under the Milan decree, and detained in port on account of her cargo only, which, after some time, was discharged, and delivered to the consignees, on their giving security to abide the event of an appeal against the seizure. The court held that the expenses incurred before the cargo was discharged, being incurred on account both of ship and cargo, were general average; but the *subsequent* expenses, being incurred solely on account of the cargo (for the ship was then free to go where she pleased,) were not general average. (*k*)

Principle on which these expenses are general average.

Expenses of the kind just mentioned, are, if incurred for the joint benefit of both ship and cargo, a general average loss, because the contract of affreightment is put an end to by the capture and detention,¹ and consequently the master, in keeping his crew together with a view of obtaining the restoration of the property, is incurring a voluntary expense *over and beyond what he was bound to by the ordinary course of his duty towards the shipper.

913 *

Wages and provisions during detention by embargo are not general average.

In cases of detentions *by embargo* the same reasons do not apply. The embargo does not, like capture or seizure, put an end to the contract of affreightment; the master, therefore, is bound to stay by the ship with his crew in the exercise of his ordinary duty towards the shipper, and the expense he is put to in having to pay and provision them during the embargo, can give him no claim to general average contribu-

(*j*) Benecké, Pr. of Indem. 239.

John. Rep. 57. See also 3 Kent's Comm.

(*k*) † Watson v. Marine Ins. Comp. 7 (5th ed.) 236, note.

speedy release from detention. Douglas v. Moody, 9 Mass. 548. Unless, indeed, the expenses do not apply to the whole of the property, but only to the ship, or cargo, or a part of it; for, under such circumstances, the expense is to be borne by the thing for whose benefit it was incurred. Vandenheuvel v. United Ins. Co. 1 John. 406; Jumel v. Marine Ins. Co. 7 John. 412; Willard v. Dorr, 3 Mason, 161; Peters v. Warren Ins. Co. 1 Story, C. C. 469; Abbott on Ship. (6th Am. ed.) 499, note.

¹ But see per Jackson, J., in Spafford v. Dodge, 14 Mass. 66, 74 to 79; Brooks v. Dorr, 2 Mass. 39.

tion. (l)¹ Another reason is that, in such case, neither ship nor cargo are in actual jeopardy, for, as Beawes expresses it, "the embargoing sovereign would not have either ship or cargo, but only hinders their departure."

General average losses — extraordinary expenditures for the common benefit.

The delay, in fact, as Lord Tenterden says, does not proceed from the act of the master and persons belonging to the ship, nor is it for the general benefit. (m)

It is, accordingly, not the subject of general average, either in this country (n) or the United States. (o)

ART. 5. Expenses of waiting for Convoy, of Delay caused by Quarantine, by being Icebound, &c.

§ 335. Where there is no certain and immediately impending danger threatening the ship in case she sails without convoy, but only the ordinary contingent perils to which all ships are exposed in time of war, the expenses caused by waiting for convoy are not a proper subject of general average contribution. (p)

These expenses are not general average when there is no impending danger.

Where, however, the danger is so imminent as to render *the protection of a man-of-war, or a delay in port till it can arrive, absolutely necessary for the safety of the whole adventure, there can be no doubt that the wages and provisions of the crew, and all other expenses incurred during such delay, ought, on principle, to come into general average, they being, in fact, extraordinary expenses, voluntarily incurred, as the only means of saving the ship and cargo from imminent danger. (r)

Where there is, they are so.

* 914

The expenses of delay caused by quarantine are not

Expenses of ordinary quarantine not general average.

(l) Benecké, Fr. of Indem. 234.

(o) † Penny v. New York Ins. Comp.

(m) Abbott on Shipping, part iv. chap. 2, p. 443, 6th ed. { 6th Amer. ed. 499. }

3 Caines, 135. Leavenworth v. Delafield, 1 Caines, 573.

(n) Robertson v. Ewer, 1 T. Rep. 127.

(p) Benecké, Fr. of Indem. 225. Bynkershoek, Quaestiones Priv. Juris, lib. iv. c. 25.

In the case of one of the ships detained by the Russian embargo, Lord Ellenborough seemed to admit the claim, but it is certainly opposed to principle so to do. Sharp v. Gladstone, 7 East, 34.

(r) Bynkershoek, Quaestiones Priv. Juris, lib. iv. c. 25. Benecké, Fr. of Indem. 225.

¹ M'Bride v. Marine Ins. Co. 7 John. 431; Harrod v. Lewis, 3 Martin, (Louis.) 311; Spafford v. Dodge, 14 Mass. 66; Martin v. Salem Ins. Co. 2 Mass. 429. But see contra, Ins. Co. of North Amer. v. Jones, 4 Dallas, 246; S. C. on appeal, 2 Binney, 547, where it was held that such expenses are a general average.

General average losses — extraordinary expenditures for the common benefit.

Expenses of being icebound not general average, except when the ship is frozen up in a port of distress.

brought into general average when the quarantine takes place in the ordinary course of the voyage. (s)

So, if a ship is frozen up in any port at which she may happen to be in the ordinary course of the voyage, or when, being unable to enter a river or harbor on account of floating ice, she is compelled to put into a harbor and winter there, the expense of paying and provisioning the crew during this detention, gives no claim to general average contribution. (t)

Where, however, a ship, for the general safety, has put into a port of distress to repair, and while there is frozen up for the winter, the increased expense of wages and provisions occasioned by this delay, is allowed to be general average in America (u) : but it is apprehended that it would only be so considered in this country when the loss, which the ship went into repair, was itself of the nature of general average. (v)

ART. 6. *Expense of remunerating Services rendered for the Common Safety.*

Principle on which they give a claim to general average.

§ 336. The remuneration by the shipowner of all those services, which are made necessary by a regard to the common safety, gives a claim to general contribution, if they are rendered under circumstances of an extraordinary nature, and on occasions when both ship and cargo are alike placed in jeopardy.

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*If such services, on the other hand, are required for the safety, or redound to the benefit, of either the ship alone, or the cargo alone, their remuneration will give no claim to contribution.

Salvage.

Salvage paid to men-of-war for rescuing a ship and her cargo from capture, or to other vessels for extricating them from the dangers of shipwreck, should, it seems, be made good by a general average contribution. (w)¹

(s) 2 Phillips Ins. 116.

(t) 1 Magens, 67. Benecké, Pr. of Indem. 214. 2 Phillips on Ins. 116.

(u) 2 Phillips, Ins. 117.

(v) Benecké, Pr. of Indem. 214.

(w) Stevens on Average, 25, 5th ed.

Benecké, Pr. of Indem. 230. 2 Phillips on Ins. 103, who cites some American decisions on the point.

¹ Although salvage is often in the nature of general average, it is not universally true, that in the sense of our law, all salvage charges are to be deemed a general

Hire of extra hands to pump a ship after springing a leak, is allowed in general average, both in England (*x*) and the United States. (*y*) But the expense of hiring extra hands, in the room of those who have deserted, is not allowed (*z*); nor are gratuities promised to seamen in order to encourage them to do their duty, for such promise is, in law, entirely void. (*a*)

General average losses—extraordinary expenditures for the common benefit.

Hire of extra hands.

A stranded vessel is in most cases in danger of being lost, unless speedy steps are taken for her preservation, either by unloading the cargo to lighten her, or by endeavoring to float her up by means of buoys, &c. with the cargo in her. The remuneration which the shipowner is obliged to pay for the services thus rendered, gives a claim to general average contribution, provided such services shall appear to have been incurred for the joint benefit of ship and cargo, which will be the case if ship and cargo are both exposed to a common danger, and both saved from it by the exertions employed for their rescue.¹

Expenses of getting ship afloat, if incurred for the joint benefit of ship and cargo, give a claim to general average.

If, however, the safety of the ship be hopeless, or that of the cargo no longer endangered, no such claim can be sustained. Thus where the ship is driven high and dry on the shore, with no prospect of saving her, the charges of unloading the cargo, not being for the benefit of the ship, and the charges of afterwards digging out the ship, being of *no benefit to the cargo, are not the subject of contribution. So, where the ship is left hopelessly stranded, but the whole of the cargo is unloaded without floating her; the ship, on the same principle, cannot contribute to the expense of unloading the cargo, nor the cargo to that of afterwards heaving off the ship. (*b*)

If otherwise, they do not.

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- (*z*) *Birkley v. Prosser*, 1 East, 219. (*a*) *Harris v. Watson*, Peake's N.P. 72.
 (*y*) † *Orrok v. Commonwealth Ins.* { 3 Kent (5th ed.) 185, 186. }
 Comp. { 21 Pick. 456. } cited in 2 Phillips, (*b*) *Benecké, Pr. of Indem.* 215, 216,
 Ins. 110. 217. 2 Phillips, Ins. 97. *Jacobsen's Sea*
 (*x*) *Plummer v. Wildman*, 3 Maule & *Laws*, book iv. c. 2.
 Sel.

average; they are only so, when incurred for the benefit of all concerned. *Peters v. Warren Ins. Co.* 1 Story, C. C. 463; *Heylyger v. New York Firm. Ins. Co.* 11 John. 85.

¹ See *Reynolds v. Ocean Ins. Co.* 22 Pick. 191; *Bedford Com. Ins. Co. v. Parker*, 2 Pick. 1; *Giles v. Eagle Ins. Co.* 2 Metcalf, 140, all cited *ante*, 900, in note.

General average losses — extraordinary expenditures for the common benefit.

Practical rules as to expenses of floating ship.

From these principles the following practical rules have been derived.

(1) These expenses are always general average when the ship takes the ground in endeavoring to enter the port of distress; for in such case ship and cargo are equally jeopardized, and the expenses are the necessary consequence of a step taken for the common safety. (c)

(2) These expenses are never general average when the stranding occurs in entering the port of destination; for in such cases it is considered that the cargo can never really be in jeopardy. (d)

(3) When the stranding takes place accidentally in the course of the voyage, and the ship be heaved off without discharging her cargo, *so as to be able to proceed on her voyage*, the expenses thus incurred are general average. (e)

ART. 7. *Money given by way of Composition to Pirates.*
Expenses of raising Money abroad, &c.

Ransom is prohibited, but a composition with pirates or belligerents, not being enemies, gives a claim to contribution.

§ 337. *Ransom* to an enemy is now prohibited in this country by positive law (f); but this extends only to enemies, and not to pirates or other plunderers; and it appears certain, that any money paid to them by the captain, in order to induce them to liberate the ship and the rest of the cargo, would be general average. (g)

It is quite clear, also, that a compromise between neutrals and belligerents is lawful, and that the amount paid by way of carrying it out gives a claim to contribution. (h)

All the expenses attendant upon raising money abroad for general average purposes, ought, on principle, to be made good by a general average contribution. Accordingly, where money has been raised for such purposes by bills drawn by the captain on his owners, all loss by exchange, interest, or discount, ought to be included in the sum for which contribution is made. (i)

(c) Stevens on Average, 22, 5th ed.

(d) Ibid.

(e) 2 Phillips, Ins. 97.

(f) 43 G. 3, c. 72, ss. 16, 17.

(g) Abbott on Shipping, part iii. c. viii. pp. 346, 347, 5th ed.

(h) Stevens on Average, 26, 5th ed.

So decided in the United States, † Douglas v. Moody, 9 Mass. Rep. 501, and see other cases cited in 2 Phillips 104. < Leavenworth v. Delafield, 1 Caines, 573. Welles v. Gray, 10 Mass. 42. Waddell v. Col. Ins. Co. 10 John. 61. >

(i) Stevens on Average, 27, 5th ed. 2

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Expense of raising money by bills, &c. is general average.

On the same principle, when money is raised for the same purposes on bottomry, the *maritime* interest must be added to the principal for the purposes of contribution. (*j*)

General average losses—extraordinary expenditures for the common benefit.

Mr. Benecké, on the same ground, considers that the premiums paid for insuring sums thus advanced for general average purposes should themselves be contributed for (*k*); but the better opinion seems that they should not. (*l*)

SECT. IV. *What contributes to General Average.*

§ 338. Having thus enumerated the losses for which a general average contribution is to be made, let us inquire upon what property such contribution is to be levied.

What contributes to general average.

*All which is ultimately saved out of the whole adventure (i. e. ship, freight, and cargo) contributes to make good the general average loss, provided it have been actually at risk at the time such loss was incurred; but not otherwise, because, if not at risk at the time of the loss, it was not saved thereby.*¹

Every thing contributes which has been at risk at the time of the loss, and is ultimately saved.

Hence goods landed, or sold for the necessities of the ship before a jettison, do not contribute (*m*); "because they were *not exposed at the time of the jettison to a community of risk, and were not saved thereby." (*n*) So neither, for the same reason, do goods taken on board *after* the jettison." (*o*) So, if there be two jettisons on two distinct occasions, and the owner of the goods *first* jettisoned recovers them after the second, they shall not contribute for the second jettison, because they were not on board when it was made. (*p*)

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By parity of reason, the goods jettisoned do not contribute for any damage done to the rest of the cargo after their jettison (*q*), for the subsequent loss is quite independent of

Phillips on Ins. 130, 131. { Humphreys (m) Emerigon, chap. xii. sect. 42, vol. v. Union Ins. Co. 3 Mason, 429. Sims v. i. p. 625, ed. 1827.
Willing, 8 Serg. & Rawle, 103. } (n) Pardessus, Cours de Droit Comm. vol. iii. p. 233, ed. 1841.
(j) Stevens on Average, 27, 5th ed. (o) Benecké, Pr. of Indem. 306.
Benecké, Pr. of Indem. 283. { Jumel (p) Emerigon, chap. xii. sect. 41, vol. v. Marine Ins. Co. 7 John. 412. } i. p. 602, ed. 1827.
(k) Benecké, Pr. of Indem. 283. (q) Ibid.
(l) See 2 Phillips on Ins. 133.

¹ See Bedford Com. Ins. Co. v. Parker, 2 Pick. 1, 10.

What contributes to general average.

That which has been sacrificed contributes equally with that which has been saved.

Freight of goods jettisoned contributes.

All merchandise contributes.

the jettison, and must be borne by those whom it concerns. (r)

That which has been sacrificed contributes, in general average, equally with that which is saved.

By the civil law, only the goods *actually saved* were to contribute (s); but, by the Consolato del Mare, which has been followed, in this respect, by the uniform practice of later times, the contribution is to be made equally upon the property saved and the property sacrificed (t); "and this," observes Boulay-Paty, "is very equitable, for, if the goods jettisoned did not contribute, the owner thereof, receiving their total value, would suffer no loss by the sacrifice, while the other owners would." (u)

Not only the goods which have been jettisoned, but those also which have been sold for the joint benefit of ship and cargo, contribute in general average, for the latter are contributed for, just like goods jettisoned (v); and not only do the goods jettisoned and sold *themselves* contribute, but the freight, which would have been payable in respect of such goods, contributes also; for as this freight is contributed for, the shipowner would suffer no loss by the sacrifice of freight *in the goods jettisoned or sold, unless he also contributed in respect thereof. (w)

All goods laden on board for the purposes of traffic contribute. By "goods" is meant, says Lord Ellenborough, "all the wares or cargo for sale laden on board the ship" (x); and Mr. J. Park says, "The rule is that all merchandise put on board for the purposes of traffic, is liable to be brought into contribution" (y); or, as Magens expresses it, "what pays no freight, pays no average." (z)¹

(r) Benecké, Pr. of Indem. 182. See Contrats a la Grosse, chap. iv. sect. 9. also Code de Commerce, art. 425. vol. ii. p. 475. ed. 1827.

(s) Id tributum servata res debent. Dig. lib. xiv. tit. 2. f. 2.

(t) Consolato del Mare, cap. 94. of the Italian translation, cap. 51. of Pardessus, Lois Maritimes, vol. ii. pp. 101, 102.

(u) Boulay-Paty, Comment. on Emerigon, vol. i. p. 632. ed. 1827.

(v) Cleirac, p. 88. No. 4. Emerigon,

(w) Stevens on Average, 61. 6th ed. (x) Hill v. Patten, 8 East, 374.

(y) Brown v. Stapleton, 4 Bingh. 119. See also Abbott on Shipping, 355. 5th ed. and 460. 6th ed. Stevens on Average, 45. 6th ed. See, however, 2 Phillips on Ins. 97.

(z) 1 Magens, 63. § 56.

¹ 3 Kent, (5th ed.) 241; Abbott, Ship. (6th Am. ed.) 502, 503; Barrelli v. Hogan, 13 Curry, (Louis.) 590.

It is on this last ground, that wearing apparel, jewels, &c., *if attached to the person*, do not contribute (a); and, on the same ground, the general practice seems to be, that *passengers' baggage* does not contribute (b), though, on principle, it does not appear why, if of sufficient value to be brought into the contributory interest, it should not do so. (c)

Gold, silver, jewels, precious stones, and all other small articles of value, unless carried about the person, or forming part of the wearing apparel, contribute. (d) Mr. Phillips thinks that bank notes, being not so much property as evidence of property, ought not to contribute; Weskett considers that they should; and his seems to be the better opinion, for they are convertible into money, and are saved by the sacrifice from becoming valueless. (e)

Deck goods contribute, though, as we have seen, they are not contributed for, except when there is a usage of trade so to carry them. (f)¹

Provisions and warlike stores do not contribute, "but have *always," says Mr. J. Park, "been considered an exception to the rule respecting contribution. (g)²

Goods belonging to government, by the old laws, do not contribute. (h) Valin, however, thinks they ought to do so (i); and it has recently been held by Mr. J. Story, in the United States, after a most masterly examination of the principles of the supposed exemption, that there was no ground for it, either in law or practice, and that goods belonging to government are as liable to contribute as any other part of the cargo saved by the sacrifice. (j)³

What contributes to general average.

Wearing apparel, jewels, &c. do not, nor passengers' baggage.

Jewels, &c. if not carried about the person, do contribute.

Deck goods contribute.

Provisions and warlike stores do not.

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Goods belonging to government contribute.

(a) Emerigon, chap. xii. sect. 42. vol. i. p. 623. Valin, tit. du Jet. art. 11. i. p. 648. ed. 1827. Code de Commerce, art. 232.

(b) Emerigon, chap. xii. sect. 42. vol. i. p. 624. ed. 1827. (g) Brown v. Stapleton, 4 Bingh. 119. Emerigon, chap. xii. sect. 42. vol. i. p. 624. ed. 1827. Benecké, Pr. of Indem. 308.

(c) Pothier, Contrats Maritimes, No. 125. 2 Phillips on Ins. 153.

(d) Peters v. Milligan, Park, 296. 8th ed. (h) Clairac, cited by Emerigon, *supra*. Jugemens d'Oleron, art. 8.

(e) 2 Phillips on Ins. 155. Weskett, tit. Contrib. No. 1. (i) Tit. des Avaries, art. 11. No. 2.

(f) Emerigon, chap. xii. sect. 42. vol. i. (j) † The United States v. Wilder, 3 Sumner, 308. 2 Phillips on Ins. 161.

¹ *Ante*, 888, and in notes.

² 3 Kent, (5th ed.) 240.

³ 3 Kent, (5th ed.) 241.

SECT. V. *Principles of General Average Adjustment, and their Application to different Kinds of General Average Losses.*

Principles of general average adjustment, and their application to different kinds of general average losses.

What adjustment of general average is.

The principle of general average adjustment the same in all cases.

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Practical rule different in case of sacrifices and expenditures.

Rule of adjustment in case of expenditures: they must be reimbursed in full, whether any thing be ultimately saved or not.

§ 339. Having thus seen in respect of what losses a contribution in general average can be claimed, and upon what property it is to be assessed, it remains to be considered how the amount to be paid in contribution is first estimated, and then apportioned on the respective interests subject thereto. The process by which this is ascertained is called the adjustment of general average.

The leading principle of general average contribution, to whatever kind of loss it may be applied, is this: — *That all the parties interested in the adventure, for the benefit of which the loss was incurred, should be sufferers by the loss in exact proportion to the extent of their respective interests, but no farther*; and this object can only be attained when the party whose property has been sacrificed, whose money has been disbursed, or whose credit has been pledged for the general benefit, is placed, by the result of the adjustment, exactly in the same position he would have stood in had the sacrifice been made *the expense incurred, or the credit pledged, not by himself, but by some other of his co-adventurers.

This is the universal principle of general average contribution, whether the loss arose from sacrifices, expenditures, or a sale of goods for the common benefit: in the application, however, of this principle to practice, there is an important distinction to be observed as to the mode by which the object is sought to be obtained, in the case of losses arising from SACRIFICES and losses founded on EXPENDITURES.

§ 340. When an *expenditure* is incurred for the general benefit, the money by which it is discharged is either supplied by the shipowner out of his own funds, or raised by a loan from some third party; in either case it is obvious that he has a personal and absolute claim against all the parties interested in the adventure, in respect of the money thus laid out for their benefit, and *that* from the moment the advance has been made; it is equally obvious, on the true principles of adjustment, that they are bound in equity to liquidate this

claim in *full*, whether any part of the property, for whose benefit the outlay was made, be ultimately saved or not. Were this not so, the object to be had in view in every adjustment of general average, would not, under all circumstances, be attained, for in those cases where the ship and goods, after being relieved by the expenditure, wholly perish before arriving at the port of destination, the party making the advance would, if no contribution were to be made, be worse off than the parties for whose benefit it was incurred, as he would not only have lost, like the rest, all his share in the adventure, but moreover would remain burdened with a debt contracted on their account, or be the loser of a sum of money laid out for their safety.

Hence, the long established rule is, that *disbursements for the general benefit must be fully reimbursed in general average, whether the ship and cargo be eventually saved or not.* (*k*)¹

* § 341. Where, however, some integral part of the adventure itself has been sacrificed for the safety of the rest, as in case of jettisons and other sacrifices of like nature, the rule of adjustment is different.

The principle, indeed, is still the same, viz. that the owner of the property sacrificed should be placed in the same condition, by the result of the adjustment, in which he would have stood if, not his property, but that of some other party to the adventure, had been sacrificed: he must not be worse off than if his goods, instead of being jettisoned, had remained on board. (*l*)

The practical rule adopted to attain this end is as follows: The property sacrificed for the general benefit is regarded as though it had never been lost, but actually constituted a portion of the whole mass of property upon which the contribution is assessed, at the time the adjustment is made; its supposed value, like the actual value of the property saved, is fixed at a certain amount, and, in proportion to that amount, it takes its full share with the rest of the adventure, for whose

Principles of general average adjustment, and their application to different kinds of general average losses.

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Rule of adjustment in case of jettisons and other sacrifices: the property sacrificed contributes to the loss equally with the property saved; and where nothing is saved, no contribution is due.

(*k*) Bencek, Pr. of Indem. 251. Stevens on Average, 20, 5th ed.

(*l*) Bencek, Pr. of Indem. 267. Kent's Comm. vol. iii. p. 242. ed. 1844.

¹ See ante, 900, in notes.

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benefit it was sacrificed, in contributing to the loss thereby incurred.

Thus, to take a very simple instance, suppose property, the value of which, if saved, would have been 100*l.*, to have been sacrificed for property the value of which, as saved, is 900*l.* The whole sum upon which the contribution is to be levied will be the aggregate value of the property sacrificed and that saved, viz. 1000*l.*; the amount to be made good being 100*l.*, or the tenth part of 1000*l.*; the property saved contributes a tenth, or 90*l.*, and the property sacrificed also a tenth, or 10*l.*, making together the whole amount lost, or 100*l.*

Fairness of this mode of adjustment.

It is clear that this is the only equitable way in which this kind of loss can be adjusted, for if the property sacrificed did not contribute like the rest, the owner of such property, receiving its total value, would be better off than the rest of the co-adventurers, and would not be in the same condition in which he would have been, if their property had been sacrificed instead of his.

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No contribution due for sacrifices where nothing is saved.

It is also clear, that where after the sacrifice the whole of the rest of the adventure utterly perishes, no contribution can be due, for in such case, even if the property had not been sacrificed, there is no reason to suppose that it would not have perished like the rest: its owner is in no worse position than he would have been had it been made by some one else on board, and not by himself. The condition of all the co-adventurers is precisely equal: all is lost; there is nothing to contribute *from*, and nothing to contribute *for*. (m) Hence, the rule with regard to sacrifices for the general benefit is, that they are not contributed for where nothing is saved.

Rule of adjustment in case of goods sold.

Are goods sold contributed for as sacrifices or expenditures?

§ 342. In the case of goods sold by the master to raise funds in a foreign port, it is a very controverted point whether the loss thence arising should be adjusted in the same manner as the loss arising from *sacrifices*, or like that arising from *expenditures*; whether, that is, in case the whole adventure subsequently perishes, the owner of the goods sold is or is

not entitled to contribution. There has been no *express* (n) decision on this subject, either in our own courts or those of the United States, and the foreign authorities are exceedingly conflicting.

Principles of general average adjustment, and their application to different kinds of general average losses.

The only express ordinance on the subject is the 68th article of the laws of Wisbuy, which directs, "That if the captain in parts beyond the seas be obliged to sell goods for the repairs of the ship, and the ship thereafter perish, he shall repay the merchant freighter, for his goods so sold, at their value at the port of loading, and shall receive therefor no freight." (p)

Authorities in favor of treating them as expenditures.

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Valin, upon the authority of this article, states the law in the same way, and argues, that as the goods were sold to defray a personal debt of the shipowner, there is no reason why he should not pay their value to the owner of the goods, whatever may be the issue of the voyage; just as if he had raised the money by drawing a bill. (q) Pothier considers that in theory Valin is right, though he acknowledges the practice to be against him. (r) By the modern French code it is provided generally, that the shipowner shall reimburse the owner of the goods sold, whether any part of the adventure be finally saved or not. (s)

And this on the ground, as stated in the French council of state (when the article just cited was under discussion there), "that the master and owners of the ship, whose duty it was to supply the necessities of the ship, had contracted an individual debt, by applying those goods to the accomplishment of their personal duty. (t)

These authorities undoubtedly seem strong and uniform; but with regard to all of them, it is important to observe that

(n) Incidentally, the point was decided in this country in *Powell v. Gudgeon*, 5 Maule & Sel. 431, where a ship-owner, who had sold goods for the necessary repairs of the ship, was held responsible to their owner, although after the repairs the ship and cargo had been totally lost by capture.

(p) The genuineness of this article appears doubtful (*Benecké*, *Pr. of Indem.* 266); it does not occur in the first printed edition of these laws, published in 1685, nor in the two earliest MSS. of 1533 and

1537. (*Pardessus*, *Lois Maritimes*, vol. i. p. 523.) Even if genuine, it applies in terms only to the case in which the goods are sold for the necessities of the ship, and could not therefore give a claim to contribution.

(q) Valin.

(r) Pothier, *Contrats Maritimes*, Nos. 43, 72.

(s) *Code de Commerce*, art. 298.

(t) *Boulay-Paty*, *Cours de Droit Comm.* tit. viii. sect. 9, vol. ii. p. 420, ed. 1834.

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Authorities in favor of treating them as sacrifices.

Authorities reconciled.

they only apply to those cases in which the goods are sold by the shipowner to defray expenses for which he himself, by the very terms of his contract with the freighter, is bound to provide funds. In these cases, as we have already seen (u), no contribution can be claimed; but the loss sustained by the owner of the goods sold gives him an absolute claim against the shipowner from the moment of their sale; and this claim *must doubtless be liquidated, whatever may be the issue of the adventure.

On the other hand, Emerigon, after a learned citation of authorities (v), decides, that, just as in the case of jettison, the goods sold are to be considered as still continuing on board, and, therefore, that, if the whole adventure subsequently perish, no contribution is due. (w)

Mr. Stevens, also, expressly says, that goods sold should, as in all other cases where a sacrifice is made, be treated as a jettison; for it is the same thing to the merchant whether the goods be sold, taken, or thrown into the sea. (x) Mr. Benecké entirely agrees with the two last cited authorities (y), and Chancellor Kent lends the authority of his great name to the same opinion. (z)

Now, even if it were necessary to suppose that these authorities actually differed as widely as at first sight they appear to do, the task of deciding between them, though difficult, would not, perhaps, be hopelessly so; but they may, as it seems, be reconciled with each other, by considering that the first class of authorities applies exclusively to the cases in which goods are sold by the shipowner to provide funds for *those necessary repairs which he himself is bound to defray*, while the second class of authorities, on the other hand, only contemplates cases in which goods are sold by the shipowner to defray *those extraordinary expenses which are incurred for the common benefit, and give a claim to general average contribution*.¹

(u) *Suprà*, Sect. III. Art. 2.

(v) Consolato del Mare, 105. Jugemens d'Oleron, art. 22, and the Regulations of Antwerp, art. 19.

(w) Emerigon, vol. ii. p. 476, ed. 1827.

(x) Stevens on Average, 15, 5th ed.

"Peu importe," says Emerigon, almost in the same words "que les marchandises aient été jetées, ou vendues pour le salut commun." Vol. ii. p. 476, ed. 1827.

(y) Benecké, Pr. of Indem. 292.

(z) 3 Kent's Comm. (5th ed.) 242, 243.

¹ See *Giles v. Eagle Ins. Co.* 2 Metcalf, 140, cited *ante*, 910.

In cases of the first class, it is clear that the shipowner contracts an absolute and personal debt to the owner of the goods sold, which he is bound to pay whatever be the issue of the adventure. In cases of the second class, the merchant ought not on principle to be entitled to payment for the goods *sold if the ship and residue of the cargo subsequently perishes; for in such case he is not put in a worse situation by the sale of the goods than if they had remained on board.

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The result, therefore of the authorities appears to be,
1. That where goods are sold to defray the necessary repairs of the ship, they are paid for, though the whole adventure may be finally lost. 2. That where they are sold for general average purposes they are not to be contributed for unless something is saved.

Rule suggested.

§ 343. There is another question on which there has been a great diversity in the positive regulations of foreign states, and the opinions of foreign jurists; viz. where the ship perishes by the agency of the very peril to avert which the sacrifice was made, but the cargo, or a part of it, is saved from the wreck,—does that which was saved contribute for that which was sacrificed?

Rule of adjustment where ship perishes but goods are saved.

Where the ship perishes at the time, in spite of the sacrifice, it is a doubtful question whether the goods saved contribute.

Authorities against any contribution being made.

On the one hand, the civil law expressly decrees that in such case no contribution shall be made, but that the merchants shall save all they can on their own account *tantum ex incendio*. (a)

The French law follows the civil law: the Code de Commerce provides, "That if the jettison does not save the ship no contribution takes place." (b)

The French jurists following the Ordinance and the Code, are unanimous in maintaining, that where the jettison and the wreck are caused by the same storm, the goods saved from the wreck shall not contribute for those jettisoned just before it took place. (c) Valin even goes further, and says, "that whenever the ship is wrecked during the continuance of the same storm that gave occasion for the jettison, even though

(a) Dig. lib. xiv. tit. 2, f. 7. Pardessus, Lois Maritimes, vol. i. p. 108.

(c) Pothier, Contrats Maritimes, No. 114. Emerigon, chap. xii. sect. 41, vol.

(b) Art. 423. Ord. de la Marine, tit. i. p. 602. ed. 1827. Boulay-Paty, Com. du Jet. art. 15. The Hamburg Ordin. tit. Von Werfung, art. 9, is to the same effect.

i. p. 602. ed. 1827. Boulay-Paty, Com. du Jet. art. 15. The Hamburg Ordin. tit. Von Werfung, art. 9, is to the same effect.

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Authorities in favor of contribution being made.

Conclusion as to the law and suggestion of a practical rule.

it may not be *till some days afterwards*, yet the goods saved do not contribute for those jettisoned." (d)

*Mr. Marshall (e) and Mr. Stevens (f) both agree that the ship must be saved *at the time*, and if not, that no contribution is due, though part of the cargo may be saved. Lastly, Mr. Chancellor Kent, in the last edition of his Commentaries, states the law in the same way, and cites two American authorities in which the point has been expressly so decided. (g)¹

On the other hand, the Spanish law expressly enacts, that in such case the goods saved shall contribute for those sacrificed. (h) Weijtsen, an early and highly esteemed writer upon average, lays down the law in the same way, and states the reason for it to be, that *if the goods jettisoned had not been so sacrificed their owners might have saved or recovered them, all or in part, as the other owners have.* (i)

Mr. Benecké, who with his usual erudition has examined all the authorities on the subject (j), and Mr. Phillips, who cites a remarkable decision in the United States in support of his views (k), both adopt the reasonings of Weijtsen and the rule of the Spanish law.

In our courts there has been no decision on the subject; and in the absence of binding authority the question would have to be determined on principle alone. In this view the argument of Weijtsen undoubtedly appears to have great force. There is, at all events, a *probability*, in the case supposed, that the goods sacrificed might, if not so sacrificed, have been saved like the rest. If, therefore, they are not

(d) Valin, tit. du Jet. art. 15, 19, vol. ii. pp. 525, 529, ed. 1829.

(e) Marshall on Ins. 541.

(f) Stevens on Average, 8, 5th ed.

(g) See 3 Kent's Comm. 234, 235.

(h) Ordenanzas di bilbao, chap. 20, art. 16.

(i) Traité des Avaries, art. 33.

(j) Benecké, System des Assurances, vol. iv. pp. 18-23, ed. Hamburg, 1810, and also in his Pr. of Indem. 178-181.

(k) 2 Phillips on Ins. 105, 108. The case referred to is that of Walker v. United States Ins. Comp. 11 Serg. & Rawle, 61, in which contribution was allowed for masts, sails, and anchors, sacrificed for the common safety, though the ship was totally lost by the very perils they were sacrificed to avert. { But see Scudder v. Bradford, 14 Pick. 13. }

¹ Ante, 883, in note; Williams v. Suffolk Ins. Co. 3 Sumner, 510; Scudder v. Bradford, 14 Pick. 13; Crockett v. Dodge, 12 Maine, 190; Walker v. Un. Ins. Co. 11 Serg. & Rawle, 61; Meech v. Robinson, 4 Wharton, 360.

contributed for, their owner, in consequence of the jettison, is worse off than he *probably* would have been if the goods sacrificed had belonged, not to him, but to some one else on board. Upon the whole it seems, that in practice it would be a sensible rule, that, where either the whole or the greater part of the cargo was saved, contribution should be made, even though the ship perished at the time: but, on the contrary, no contribution should be due where the goods saved were either small in quantity, or greatly damaged in condition.

Principles of general average adjustment, and their application to different kinds of general average losses.

* 928

Mr. Benecké considers that on principle the same rule should be extended as well to sacrifices of the ship's tackle, &c., as to jettisons properly so called: but he admits that in practice such contribution is unusual, owing to the very small value of the spars and rigging under the circumstances supposed. (l)

But, whatever diversity of opinion may exist with regard to the point just discussed, there is no doubt whatever about *this* position: that, if the ship survives the peril, to avert which the sacrifice was made, and is ultimately wrecked in the after part of the voyage, all that is saved from the wreck must contribute to make good that which was previously sacrificed (m); for, without such previous sacrifice, nothing would have been saved at all. (n)

Where the ship is saved at the time, but ultimately perishes in the after part of the voyage.

Upon the whole, therefore, the following appear to be the rules derivable from general principles, and the tenor of the authorities on the subject of this section.

Recapitulation.

1. In case of losses arising from expenditures for the general benefit, they are to be reimbursed in full, though nothing be finally saved.

(l) Benecké, *Pr. of Indem.* 182, 183. In *† Walker v. United States Ins. Comp.* 11 Serg. & Rawle, 61, contribution was made for masts, sails, and anchors, though the ship perished by the peril which they were sacrificed to avert. { But in *Scudder v. Bradford*, 14 Pick. 13, where the masts were cut away, but the vessel afterwards, notwithstanding that sacrifice, went ashore and was lost, it was held, that the cargo saved was not liable to a general average, for the sacrifice was unavailing. See *Meech v. Robinson*, 4 Wharton, 360. }

(m) See in Benecké all the foreign ordinances, *System des Assurances*, vol. iv. p. 23. ed. 1810. See for the United States, 2 Phillips, *Ins.* 129. 3 Kent's *Comm.* (5th ed.) 239.

(n) Emerigon, chap. xii. sect. 41. vol. i. p. 602. ed. 1827. Boulay-Paty says that, in order to apply the rule, the storm which occasioned the jettison must have been entirely at an end, and the ship have proceeded on her voyage again in the ordinary course. *Comment. on Emerigon*, *ibid.* p. 604.

Principles of general average adjustment, and their application to different kinds of average losses.

929 *

2. In case of losses arising from sacrifices, no contribution is to be made where the *whole* adventure saved by the sacrifice subsequently perishes.

*3. Losses arising from the sale of goods are contributed for like expenditures, when the goods were sold to defray expenses for which the shipowner was bound to provide; and like sacrifices, when sold for the general benefit.

4. Where the ship perishes by the peril which the sacrifice was intended to avert, the goods saved should, it seems, only contribute for those sacrificed, in case the whole or greater part of the cargo be preserved.

5. But if immediate safety be procured by the sacrifice, and the ship afterwards perishes by another peril, the goods saved from the wreck, however damaged, must contribute for those sacrificed.

SECT. VI. *Mode of estimating the Amount of Loss for the purposes of General Average Adjustment.*¹

Mode of estimating the amount of loss for the purposes of general average adjustment.

§ 344. Supposing the case to be one in which contribution is due, the first step to be taken towards adjusting the general average is, to ascertain the value at which the property sacrificed, and the loss incurred, ought to be estimated, for the purposes of the contribution.

Loss arising from jettison of goods.

As a general rule, goods jettisoned are to be contributed for on the same value at which they contribute, which is, in almost all cases, as will presently appear, *the net value they would have sold for at their port of destination, deducting freight, duty, and landing expenses.* (p)²

Where the average is adjusted at the port of departure.

Where, however, the jettison takes place very near the outset of the voyage, so that the ship puts back into the port of departure, and the adjustment is settled in that port, the

(p) Benecké, Pr. of Indem. 268. 2 Phillips, 138.

¹ In adjusting general average or contributions, no distinction is to be regarded between a valued and an open policy. *Clark v. United F. & M. Ins. Co.* 7 Mass. 365; *Bedford Com. Ins. Co. v. Parker*, 2 Pick. 11. But the value in the policy may be taken as the basis, where no other is suggested. 2 Pick. 11.

² *Tudor v. Macomber*, 14 Pick. 34; *Rogers v. Mechanics Ins. Co.* 2 Story, C. C. 173; 3 Kent, (5th ed.) 242.

goods jettisoned ought to be contributed for at their *cost price*, including shipping charges and premiums of insurance, such being their value at the port where the adjustment is settled. (q) ¹

*If the ship does not reach the port of destination, and the adjustment is settled at some port in the course of the voyage, the goods jettisoned must be contributed for at the net value they would have realized if they had been sold there. (r) ²

Where, after the jettison, the rest of the cargo arrives in port in a damaged state, owing to causes which would equally have affected the goods jettisoned had they remained on board, the amount at which the goods jettisoned should be contributed for, is the net sum they would have realized in a damaged state. (s) The amount of damage done to ship or goods by the jettison is to be estimated, for the purposes of adjustment, by deducting their net proceeds, as damaged, from their net proceeds, if sound. (t) ³ If the goods jettisoned were subject to leakage or breakage, the ordinary leakage and breakage ought, it seems, to be deducted in estimating the value at which they are to be contributed for. (u) Where goods which have been jettisoned are recovered *before* the adjustment takes place, the amount at which they are to be con-

Mode of estimating the amount of loss for the purposes of general average adjustment.

* 930

Where it is adjusted at an intermediate port.

Where the cargo saved arrives in a damaged state.

Valuation of damage occasioned by jettison.

Where goods jettisoned have been recovered before adjustment.

(q) *Benecké, Pr. of Indem. 289.* So held in the United States, *† Tudor v. Macomber, 14 Pick. 34.* 2 Phillips, *Ins. 135.*

(r) *Benecké, Pr. of Indem. 289.*

(s) *Benecké, Pr. of Indem. 293.* Mr. Phillips dissents from this rule on the ground of the practical difficulty of its application. (Vol. ii. p 137.) It seems,

however, entirely in accordance with the principle established by the early maritime codes, *viz.* that the goods jettisoned should be paid for after the rate at which the other goods on board at the time should be sold, on their arrival in port.

(t) *Benecké, Pr. of Indem. 292.*

(u) 2 Phillips, *Ins. 135.*

¹ See *Rogers v. Mechanics Ins. Co.* 2 Story, C. C. 173. As a general rule, the valuation of the cargo in the bill of lading is conclusive between the owner of the ship and the owner of the cargo, in the adjustment of a general average at the home port. *Tudor v. Macomber, 14 Pick. 34.* Where the cargo jettisoned consisted of ice, which had no market value at the port of departure, but in the bill of lading, (there being no invoice,) was valued at a certain sum, and the vessel returned to her port of departure; the sum in the bill of lading was taken to be the value as between the shipper and the shipowner, in adjusting the general average at that port; and as no freight had been earned, the contribution was required to be made by the ship and cargo alone. *Ib.*

² See *Abbott, Shipp.* (6th Am. ed.) 503, 504; *The Mutual Safety Ins. Co. v. Cargo of Ship George*, Dist. Ct. South Dist. N. Y. Adm. 8 Law Rep. 361; S. C. New York Legal Observer for 1845, p. 260; *Clark v. United Ins. Co.* 7 Mass. 365; *Wells v. Gray*, 10 Mass. 42.

³ See per Putnam, J. in *Tudor v. Macomber, 14 Pick. 37.*

Mode of estimating the amount of loss for the purposes of general average adjustment.

Where recovered *after* adjustment.

Valuation of jewels, &c. packed as articles of inferior value.

931 *

Valuation of freight lost on the goods.

Loss arising from sacrifices of part of ship.

tributed for is the amount of the damage done to them by the jettison, and the expenses of recovering them. (v)

Where they are recovered *after* the adjustment, the amount which has been paid for them in contribution over and above what is necessary to cover these two items, is to be refunded to the several parties on whom the contribution has been assessed. (w)

Where jewels, or other valuables, are denominated in the bill of lading as articles of inferior value, they are to be contributed for on the same footing as they are described in the bill of lading (x);¹ so, if they are packed up in a box without any intimation to the master of their value, and this box be thrown overboard, it is decreed by the Laws of Wisbuy, and stated by foreign jurists, that they shall be contributed for only upon the value of the box, or of the goods the master might reasonably suppose it to contain. (y)

The amount payable in contribution for the freight lost in the goods jettisoned is the gross freight they would have earned on arrival. (z)²

Damage purposely inflicted on the ship for the general benefit is to be estimated, for the purposes of adjustment, at the *cost of the repairs, deducting one third for the old materials*; where no repairs have been made the damage must be a subject of estimation.³

It has been held in the United States, that, where the value of the whole ship is to be contributed for, as in the case of her total loss by voluntary stranding, with a saving of the cargo, the measure of the loss, for the purposes of adjust-

(v) Emerigon, chap. xii. sect. 40. vol. sen, sect. 33. Casaregis, disc. 46. No. i. p. 597. Code de Commerce, art. 429. 49; and see 2 Phillips on Ins. 139.

(w) Ibid.

(x) Stevens on Average, 20. 5th ed. 2

(z) Benecké, Pr. of Indem. 294.

Phillips on Ins. 137.

(y) Laws of Wisbuy, art. 43. Weijt-

¹ See *Tudor v. Macomber*, 14 Pick. 34, cited *ante*, 829, in note.

² *Mutual Safety Ins. Co. v. Cargo of Ship George*, Dist. Ct. South Dist. N. York, Adm. 8 Law Rep. 361; S. C. New York Legal Observer for 1845, p. 260; *Columbian Ins. Co. v. Ashby*, 13 Peters, (S. C.) 331. See 3 Kent, (5th ed.) 243.

³ *Abbott, Shipp.* (6th Am. ed.) 504, 505. 3 Kent, (5th ed.) 243; *Strong v. Fire Ins. Co.* 11 John. 323; *Gray v. Waln*, 2 Serg. & Rawle, 229, 237, 258; 2 Phil. Ins. 138.

ment, is the value of the ship to her owner *at the time she ran aground*. (a)¹

In the same case, also, it has been held that the freight which the ship would have earned on arrival is to be contributed for at its gross amount. (b)

The amount at which goods sold for the general benefit are to be paid for in contribution is, as in the case of goods jettisoned, the net value they would have fetched at the port of discharge, deducting freight, duty, and landing expenses. (c) If the goods so sold in a port of necessity fetch a higher price there, than they would have sold for at the port of discharge, the owners of the goods shall be repaid for them at the whole value for which they were, in fact, sold (d): for the sale of goods in such a case being a *forced loan*, the borrowers shall pay at least as much as they borrow, having no right to say to the involuntary lender that, had they not taken his property, he himself would have made much less of it. (e)

When money is raised abroad, by bills or otherwise, for the sake of defraying expenses of the nature of general average, the amount actually expended is the amount to be contributed for, including therein, as we have already seen, all interest, both marine and ordinary, and all loss by discount on bills and by the rate of exchange. (f)²

The result, therefore, of the authorities appears to be,

1. That goods jettisoned, or sold for the general benefit, are, as a general rule, contributed for at the net value they would have realized had they arrived at the port of discharge.
2. Damage to the ship is contributed for at the cost of repairs, deducting one third new for old.
3. Loss of freight

(a) 2 Phillips on Ins. 137.

(b) † *Columbian Ins. Comp. v. Ashby*, 13 Peters (S. C.) 331. †

(c) 2 Phillips on Ins. 132. See † *Depau v. Ocean Ins. Comp.* 5 Cowen, 63.

(d) *Richardson v. Nourse*, 3 B. & Ald. 237.

(e) 2 Phillips on Ins. 135. Mr. Bencké dissents from this decision (see Pr. of Indem. 274,) but it seems well founded.

(f) *Benecké, Pr. of Indem.* 250. 2 Phillips on Ins. 130.

Mode of estimating the amount of loss for the purposes of general average adjustment.

Loss incurred by goods sold for the general benefit.

* 932

Loss by raising money on credit, &c.

Result of the authorities.

¹ Mr. Chancellor Kent says, — "The value of the vessel lost is estimated according to the value at the port of departure, making a reasonable allowance for wear and tear up to the time of the disaster." 3 Kent, (5th ed.) 243. This rule was followed in *Mutual Safety Ins. Co. v. Cargo of Ship George*, Dist. Ct. South Dist. N. York Adm. 8 Law Rep. 361.

² *Ante*, 917.

Mode of estimating the amount of loss for the purposes of general average adjustment.

— at the gross sum which would have been earned by the goods jettisoned or sold. 4. Expenses of raising money abroad for disbursements — at the amount actually expended, including interest, both ordinary and marine, and the loss incurred by discount and exchange.

SECT. VII. *Mode of estimating the Value of the Property saved for the purposes of general Average Adjustment.*¹

Mode of estimating the value of the property saved for the purposes of general average adjustment.

Principle upon which the property saved is valued.

933 *

The rule of computation differs in case of sacrifices and expenditures.

Time with reference to which the valuation is made, in case of expenditures.

§ 345. Having thus seen the mode in which the property sacrificed is to be valued for the purposes of general average adjustment, let us now see what valuation is put, for the same purposes, upon the property saved: in other words, let us inquire what is its contributory value. The general principle of valuation is simply this: *that the value of the property to its owners, as saved by the sacrifice or the expenditure, is the value upon the footing of which it ought to contribute towards making good the loss;*" or, as the rule is frequently given, "the contributory value of the different interests is *their value to their owner at the time and place to which the apportionment relates."

Simple, however, as this principle is, its practical application has given rise to considerable difficulties, which have chiefly arisen from not sufficiently bearing in mind the distinction, already noticed, between the mode of adjustment adopted in the case of sacrifices, and that which is pursued in the case of expenditures.

In the case of *expenditures*, as we have already seen, contribution is due to the party incurring them *from the moment of the outlay*, and is payable in all events, whatever may be the subsequent fate of the adventure:² in these cases, therefore, the time and place to which the apportionment relates is the time and place of the disbursement, and the contributory value, therefore, of the property saved, is the sum it was worth to its owner at the time and place at which the expenditure was incurred (without reference to any sub-

¹ Bedford Com. Ins. Co. v. Parker; 2 Pick. 11; Clark v. United F. & M. Ins. Co. 7 Mass. 365, cited *ante*, 929.

² See *ante*, 900, in note.

sequent deterioration which may have taken place before its arrival in port). (g)

Mode of estimating the value of the property saved for the purposes of general average adjustment.

Where, however, the loss to be contributed for arises from *sacrifices*, the case is different. There, as we have also seen, the property at risk when the sacrifice was made is not considered to be saved to its owners, so as to be subject to contribution, until its arrival at the place where the adjustment is made.

This place ought, whenever practicable, to be the port of discharge, and the time at which the adjustment should be made is the time of the ship's arrival there. Hence the rule, that in case of losses arising from sacrifices, the contributory value of the different interests saved thereby is *their net value in the state in which they actually come into their owner's hands at the port of destination*. (h)

Time with reference to which the valuation is made, in case of sacrifices.

*Accordingly, where the loss to be adjusted has arisen partly from sacrifices and partly from expenditures, the contributory value of the property saved ought, in theory, to be estimated on two different principles. Mr. Phillips considers, indeed, that this is the true rule to be followed in practice; but it does not appear to be adopted in this country, and, in fact, would be attended with a degree of difficulty and embarrassment inconsistent with the exigencies of actual business. (i)

* 934
Practical rule of valuation.

In what follows, unless otherwise expressed, the loss to be made good by the contribution is assumed to be loss arising from *sacrifices*.

ART. 1. *Contributory Value of the ship.*

§ 346. Agreeably to the principles already laid down, we shall find it everywhere acknowledged that the ship is to be estimated for the purposes of contribution solely *with reference to her value as finally saved by the sacrifice*, to the amount, that is, at which her owner could afford to sell her at the time and place at which the adjustment is made. (j) Her contributory

Principle of valuation of ship for the purposes of contribution.

(g) Benecké, Pr. of Indem. 298. So Rep. 518. *Spafford v. Dodge*, 14 Mass. Rep. 79. 2 Phillips on Ins. 139.
(A) Stevens on Average, 49. 5th ed.
(i) 2 Phillips on Ins. 170.
(j) Stevens, §3. 5th ed. Benecké, Pr. of Indem. 311. 2 Phillips on Ins. 142.

in the United States it has been decided that in such cases the contribution must be adjusted according to the value saved at the time when the expense was incurred. † *Douglas v. Moody*, 9 Mass.

Mode of estimating the value of the property saved for the purposes of general average adjustment.

Difficulty of fixing a practical rule.

935 *

Rule given by Mr. Stevens.

Remarks on it.

value, in fact, as the rule may be shortly given, is *her worth to the owners in the state in which she arrives.* (k)¹ •

There is no dispute about the general principle; but there has been great difficulty in adopting any practical rule of valuation, a difficulty arising principally from the fact that the ship, generally speaking, is not, like the goods, actually sold at the port of destination; so that a rather nice process of calculation must be gone through, in order to estimate, in the absence of that accurate criterion which a sale alone can supply, the true worth to the shipowner of that which has been saved to him by the sacrifice.

In order to save the necessity for this calculation, the amount at which the ship shall be valued for the purposes of contribution, has been very generally, but very variously, fixed by the positive laws of almost all mercantile states. (l)

In our own country we have no fixed rule upon the subject; but Mr. Stevens, who is a high authority upon all that relates to the adjustment of general average, gives the following as that which ought to be observed in practice. (m)

Deduct from the original value of the ship when she sailed: 1. The provisions and stores expended; 2. The wear and tear of the voyage; 3. Any partial loss incurred *up to the time when the general average loss took place.*²

With regard to the *first* deduction, it appears right on principle that the provisions and stores should be deducted from the value of the ship, rather than from that of the freight.

(k) If the ship were actually sold, the price she fetched would of course be her contributory value. Thus, in the United States, where a ship, after being saved by jettison, was subsequently so much damaged in the course of the same voyage, that she was obliged to be sold, the average was calculated on the price she sold for. † Bell v. Smith, 2 John. Rep. 98.

(l) Mr. Benecké, with his usual industry, has collected the different regulations on this point. Pr. of Indemn. 323-325.

The rule of the French law is to deduct one half. Code de Commerce, art. 304, 401. In one case in the United States, after capture and detention of the ship, one fifth was deducted from her original, in order to estimate her contributory value. † Lavenworth v. Delafield, 1 Caines, 574; and the rule of deducting one fifth appears to be followed in some of the States: Mr. Phillips, however, disapproves of it. Vol. ii. p. 141.

(m) Stevens on Average, 53, 5th ed.

¹ See Abbott, Shipp. (6th Am. ed.) 503. Mr. Chancellor Kent says, — "The owners of the ship contribute according to her value at the end of the voyage, and according to the net amount of the freight and earnings." 3 Kent, (5th ed.) 242.

² See Mutual Safety Ins. Co. v. Cargo of Ship George, cited *ante*, 931, in note.

With regard to the *second* deduction "for wear and tear," that can admit of no possible doubt; for, as M. Pardessus observes, "that which is finally saved by the jettison is not a *new* ship, but a ship more or less deteriorated by the wear and tear of the voyage, &c." (n)

Mode of estimating the value of the property saved for the purposes of general average adjustment.

With regard to the third deduction, however, there seems to be no reason for confining it to damage incurred *before* the general average loss, for the only value to be attended to in the adjustment is what the vessel is worth to her owner in the state in which she actually comes into his hands; and this value must be what remains after deducting *the damage arising from all losses sustained by the ship down to her arrival in the port where the adjustment is made. (o)

* 936

When the general average loss to be made good consists of a sacrifice of some part of the ship herself, as a mast, cable, &c., the sum paid to the ship by way of contribution for this loss must be *added* to the original value, in order to make up her true value for the purposes of adjustment. (p)

Sums paid in contribution, to the ship, are to be added, to make up the contributory value.

Thus, taking the same data as before, suppose the general average loss to arise out of the sacrifice of a mast worth 100*l.*, and 50*l.* to have been paid in contribution to the shipowner on account of this loss, the contributory value of the ship would be ascertained, as follows:—

	£
Value of ship at outset	1000
• Deduct partial loss	£50
— provisions, and wear and tear	£50 — 100
	900
Add for amount of mast made good by con- } tribution £50	50
Contributory value of ship	950

(n) Car le jet n'a pas sauvé un navire neuf, mais un navire plus ou moins dégradé par la navigation. Pardessus, Cours de Droit Commercial, vol. iii. p. 241, ed 1841.

(o) Benecké, Pr. of Indem. 311. Mr. Phillips thinks that deductions ought also to be made in respect of all subsequent *general average losses*, on the ground, that the sum paid by the ship in respect of them, is so much lost to the shipowner;

and, therefore, not finally saved to him by the sacrifice, vol. ii. p. 143. Accordingly, where a ship after jettison was wrecked, but the materials saved, these were held to be bound to contribute upon their value as saved, after deducting the expenses of salvage. † Dodge v. Union Ins. Comp. 17 Pick. 453. 2 Phillips on Ins. 143.

(p) Stevens on Average, 54, 5th ed. 2 Phillips on Ins. 144.

ART. 2. *Contributory Value of Freight.*

Mode of estimating the value of the property saved for the purposes of general average adjustment.

Principle on which freight contributes in general average, and by which its contributory value is ascertained.

* 937

The shipowner can only be called on to contribute in respect of that amount of freight which was pending at the time of the sacrifice, and saved thereby.

§ 347. The principle upon which freight is to contribute in the case of general average is, that it was one of the things at hazard at the time when that sacrifice was made which produced the general average loss (*q*); and the principle upon which its contributory value is assessed is the same as in the *case of the ship; viz. that the amount to contribute is the amount eventually saved by the sacrifice.

From these two principles it follows, 1. *That freight, in order to be contributory at all, must have been pending at the time of the sacrifice*; ¹ 2. *That the true contributory value of freight is the actual sum finally received as freight by the shipowner, after deducting all the expenses of earning it.* (*r*) ²

All the cases which have been decided, and the practical rules which have been laid down, on this subject are based on these two simple principles.

From the first principle it follows, and has been accordingly decided in the United States, that if the cargo, or a part of it, have been delivered before the sacrifice took place, the freight due in respect thereof does not contribute (*s*): so it has been there decided, that if freight be paid in advance it does not contribute *quâ* freight (*t*); so if only freight *pro rata itineris* is earned, that alone contributes (*u*): on the same principle, where a ship was chartered to sail on successive passages, and the general average loss happened in the course of the last passage, it was held in the United States that the freight on which contribution was to be assessed, was that earned in the last passage only, as that alone was the freight which would have been lost but for the sacrifice. (*v*)

(*g*) Per Lord Ellenborough in *Cox v. Fireman's Ins. Comp.* Ibid. 323, cited 2 May, 4 Maule & Sel. 159. Phillips on Ins. 145.

(*r*) Stevens, 63, 5th ed. 2 Phillips on Ins. 149.

(*s*) † Dunham v. Commercial Ins. Comp. 11 John. 315. † Strong v. New York

(*t*) 2 Phillips on Ins. 145, and 164.

(*u*) † Maggrath v. Church, 1 Caines, 196.

(*v*) † Spafford v. Dodge, 14 Mass. Rep. 66. 2 Phillips on Ins. 147.

¹ Dunham v. Com. Ins. Co. 11 John. 315; Strong v. N. Y. Fireman's Ins. Co. 11 John. 323.

² See 3 Kent, (5th ed.) 243; Humphreys v. Union Ins. Co. 3 Mason, 439.

In one case where a ship was chartered for the voyage out and home, under a stipulation that no freight was to be paid for the homeward voyage unless the ship performed her voyage out and home, and arrived at her port of departure in safety, a question was raised whether, and in what proportion, the freight payable under the charter-party was to contribute for a general average incurred on the *outward* voyage.

The facts were these: a ship was chartered by the East India Company for one entire voyage out and home; by the charter-party it was stipulated that the Company should pay freight at a specified rate for the homeward voyage, *on condition that the ship performed her voyage, and arrived at her home port of departure in safety, but not otherwise*; an insurance was effected on the ship for the *outward* voyage only, and in the course of this *outward* voyage a general average loss was incurred: before the trial the ship had arrived at her home port of departure, and earned full freight: the ship-owner having brought his action against the underwriters on ship for a ratable proportion of the contribution which had been assessed on him as shipowner in respect of the general average loss on the outward voyage, they claimed to deduct a certain sum as the amount of contribution due to them (as standing in the place of the owner of the ship) upon the whole freight, payable under the charter-party, and ultimately earned. The question for the court was, whether, under these circumstances, such freight was liable to contribute for the general average incurred on the outward voyage: the court held, that it was, on the ground that the whole freight payable under the charter-party was one entire and indivisible sum payable for the use of the ship out and home; therefore, when ultimately earned, having been put to hazard, and saved by the measures taken for the general benefit, it ought to contribute. (w)

The court laid great stress on the fact that the freight had actually been earned before the trial; even under this limitation Mr. Benecké dissents from the authority of the case, on the ground taken by the counsel for the assured, in argument, viz. that the *homeward* freight can in no case be liable for general average incurred on the *outward* voyage: the

Mode of estimating the value of the property saved for the purposes of general average adjustment.

Williams v. London Ass. Comp. 1 M. & Sel. 318.

* 938

Where a ship is chartered for an entire voyage out and home, under a stipulation that no freight is to be paid unless she arrives in safety at her home port of departure, the whole freight ultimately earned under such charter-party is liable to contribute for a general average loss incurred on the *outward* voyage.

Remarks on this case.

(w) Williams v. London Ass. Com. 1 M. & Sel. 318. See per Bayley, J. 337.

Mode of estimating the value of the property saved for the purposes of general average adjustment.

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Only the net freight, after deducting all expenses of earning it, is to contribute.

arguments he adduces in support of his view seem deserving of great consideration, and it may perhaps be doubted whether the case of *Williams v. London Assurance Company* can, on principle, be supported. (x) ¹

*From the second principle it follows that, in order to ascertain the amount at which freight ought to contribute, the wages of the master and crew ought to be deducted from the gross amount of the freight; for they are part of the necessary expenses of earning freight, and must, in any case, be paid out of it. (y)

This deduction must, however, upon the same principle, be confined to the wages *due at the termination of the voyage*, for they alone are payable out of the freight saved; wages which have become due previously to the sacrifice are evidently not to be deducted. (z)

As only the actual clear amount of freight finally received by the shipowner can be called upon to contribute, it is evident that where, owing to the length of the voyage, or other causes, freight is entirely consumed by the wages, it cannot contribute, for its contributory value is only its excess above wages. (a)

On the same principle, where the first ship is disabled, and the cargo is sent on in a second, the excess of freight for the entire voyage, over that paid to the substituted ship, alone forms the contributory value of freight. Hence, where the shipowner, in such case, is obliged to pay the same or a higher freight for the hire of the second ship than he was to receive for the use of the first, then, in case the loss occurred before the transshipment, no contribution is due for freight, because no freight in such case is finally received by the shipowner, or saved by the sacrifice. (b) The practical rule, therefore, is, *that freight contributes to general average upon its net value, after deducting the wages of the master and crew.*²

(x) *Benecké, Pr. of Indem.* 316. See also 2 *Phillips on Ins.* 147, who takes the same view.

(x) *Stevens on Average*, 56, 5th ed.

(a) *Ibid.* 60.

(b) So decided in America. † *Searle*

(y) *Stevens on Average*, 63, 5th ed. 2 *v. Scovell*, 4 *Johns.* 218. 2 *Phillips on Ins.* 146.

¹ See *Spafford v. Dodge*, 14 *Mass.* 66.

² See *Humphreys v. Union Ins. Co.* 3 *Mason*, 439; *Bedford Com. Ins. Co. v. Parker*, 2 *Pick.* 1; *Leavenworth v. Delafield*, 1 *Caines*, 572; *Heylyger v. N. York Firem. Ins. Co.* 11 *John.* 85.

ART. 3. *Contributory Value of Goods.*

§ 348. Like ship and freight, goods contribute upon the value finally saved out of what was at risk at the time of the *sacrifice. In other words, the value of the goods, as they come into the hands of their owners, *at the place and time of adjustment*, is the value upon which they are to contribute. (c)

Mode of estimating the value of the property saved for the purposes of general average adjustment.

* 940

Goods contribute on their net value at the time and place of adjustment. The port of adjustment is generally the port of destination.

Now the place at which the adjustment should, if possible, be made, is the port of discharge, and the time of making it, is as speedily as possible after the ship's arrival there. Hence, the general practical rule is, *That goods contribute on their actual net value, i. e. on their market price at the port of adjustment, free of all charges for freight, duty, and expenses of landing.* (d) ¹

The most unexceptionable mode of settlement is thus to adjust the average claim after the ship has arrived at her port of discharge; it may sometimes, however, happen that a general average loss is incurred at the outset of the voyage, and in such case, if the ship in consequence put back into the *port of loading*, the adjustment should be settled *there*; and in such case, the contributory value of the goods will be "their cost on board without insurance," i. e. *the amount of tradesmen's bills and shipping charges*, "such being the value at risk." (e)

Where, however, the loss is incurred at the outset of the voyage, the port of departure may be the port of adjustment.

An adjustment at a foreign port of distress (called a foreign adjustment) ought always, if possible, to be avoided, on account of the disputes which are apt to arise (as we shall presently see) in consequence of the items charged in such adjustment being assessed on different principles than those which prevail in the country of the underwriters. When the adjustment, however, is settled abroad, the contributory value of the goods ought to be either their invoice price, or, if sold, the price they sold for. (f)

Adjustment at a foreign port should be avoided.

If the sacrifice to be contributed for consists of a jettison

The value of the goods jettisoned or sold must be added to the value of the goods saved.

(c) Pr, Benecké, of Indem. 298. Stevens on Average, 48, 5th ed. Benecké, Pr. of Indem. 301. 2 Phillips on Ins. 163.

(d) Stevens on Average, 48, 5th ed.

(e) Stevens on Average, 47, 5th ed.

(f) Ibid. 49.

Mode of estimating the value of the property saved for the purposes of general average adjustment.

941 *

or sale of goods for the general benefit, then, on the principle already illustrated in the case of ship and freight, the estimated net value of the goods jettisoned or sold must be *added to the net value of the goods saved, and the whole will be the contributory value of the goods. (g)

Thus, let the net value of the goods saved,
deducting freight, be - - - £1000

Add net value of the goods jettisoned, &c,
deducting freight, &c. - - - 100

Value of goods to contribute - - £1100

Damaged goods must be taken at their damaged value, unless the damage be caused by the sacrifice.

In whatever way the goods saved are deteriorated or damaged, by the perils of the sea, after the sacrifice, they must, of course, be taken at such deteriorated value; for such is their value as finally saved (h): if, however, they have been damaged by the very sacrifice for which contribution is claimed, then they must be taken at their value as *sound*, for *this* damage is made good to them in contribution. (i)

But freight paid in advance is not to be so added.

When the shipper pays freight in *advance* at the outset of the voyage, a question has been raised whether the freight so paid is to be added to the contributory value of the goods. Mr. Benecké thinks it is, because the loss of such freight to the shipper was saved by the sacrifice. (j)

Mr. Phillips is of a contrary opinion (k): and it appears to me, for the reasons he gives, that, on principle, such addition ought not to be made, but that the shipper who thus pays in advance should be regarded as the purchaser of the freight, and not be exposed, on account of it, to any claim for contribution.

ART. 4. *Example of an Adjustment as settled on the above Principles.*

§ 349. By way of illustrating what has preceded, the following example, in figures, of a general average adjustment,

(g) Ibid. 48.

(h) Benecké, *Pr. of Indem.* 298.

(i) Stevens on Average, 48, 5th ed.

(j) Benecké, *Pr. of Indem.* 314.

(k) 2 Phillips on Ins. 164, 165.

*settled after the ship's arrival at her port of destination, is taken, with a few alterations, from Abbott on Shipping. (l)

Mode of estimating the value of the property saved for the purposes of general average adjustment.

* 942

VALUATION OF LOSSES.		VALUE OF ARTICLES TO CONTRIBUTE.	
Goods of A. jettisoned	£ 500	Goods of A. jettisoned	£500
Damage done to goods of B. by the jettison	200	Net value of the goods of B., deducting freight and charges	1000
Freight of A.'s goods jettisoned	100	Ditto of the goods of C.	500
Price of a new cable, anchor, and mast	£300	Ditto ditto of D.	2000
Deduct one-third new for old	100	Ditto ditto of E.	5000
	200	Value of the ship, deducting wear and tear, amount of particular average loss, stores, and provisions (n)	2000
Expense of bringing the ship off the sands	50	Clear freight, deducting wages	800
Pilotage and expenses of going into and out of the port where the ship put in to refit	100		
Expenses there (m)	25		
Adjusting this average	4		
Postage	1		
Total amount of losses to be contributed for	£1180	Total of contributory value	£11,800

Then, as £11,800 : £1180 :: £100 : £10, therefore each person will lose 10 per cent. on the value of his interest in ship, freight, and cargo.

Thus A loses 50*l.*, B 100*l.*, C 50*l.*, D 200*l.*, E 500*l.* the ship-owners 280*l.*

The shipowners, therefore, are to pay towards the contribution 280*l.*: but they are to be paid 480*l.* (i. e. freight, 100*l.*; mast, cable, and anchors sacrificed, 200*l.*; disbursements, 180.) : on the whole, therefore,

	£
The shipowners are actually to receive	- 200
A contributes 50 <i>l.</i> but is to be paid 500 <i>l.</i> ∴ actually receives	- 450
B contributes 100 <i>l.</i> , but is to be paid 200 <i>l.</i> ∴ actually receives	- 100
Total to be actually received	£750

(l) 6th ed. p. 449.

(n) See Stevens on Average *quâ supra*.

(m) The loss, to repair which the ship put in to refit, being general average.

Mode of estimating the value of the property saved for the purposes of general average adjustment.	*On the other hand, C, D, and E have lost nothing, and are to pay as before, viz. —	} C D E	-	-	£50
			-	-	290
			-	-	500
			<hr/>		
943 *	Total to be actually paid	-	-	-	£750

943 *

This amount is exactly equal to the total to be actually received, and must be paid to each person entitled to contribution in ratable proportion.

SECT. VIII. *Foreign Adjustment.*

Foreign adjustment.

What a foreign adjustment is.

§ 350. The proper place for the adjustment of general average is, as we have already seen, the ship's port of destination or discharge; when this happens to be a foreign port, the general average loss is adjusted there, according to the law and usage of the country to which such foreign port belongs; and the adjustment so made is called a foreign adjustment. (o)

It has also been already observed, that there is great diversity in the practice of different countries with regard to what shall or shall not be included in general average; hence, it must frequently happen in foreign adjustments, either that losses are included and charged for, which are general average in the country where the adjustment is settled, but not so in the country where the charter-party was entered into and the policy of insurance effected; or else that a different proportion of contribution is assessed in the foreign port from what would, under similar circumstances, have been assessed in the home port.

In either case two questions arise: — *First*, are the co-adventurers themselves bound by the foreign adjustment; i. e. are the owners of ship, goods, and freight, liable as between themselves to pay the amount of contribution so *assessed; *Secondly*, are the underwriters bound by it; i. e. are they bound to indemnify the assured for their ratable proportion of the contribution so paid.

944 *

(o) *Simmonds v. White*, 2 B & Cr. 803.

With regard to the first question there is now no controversy amongst jurists, for, as it is expressed by Mr. Justice Story, "When a case of general average occurs, if it is settled in the foreign port of destination, or in any other foreign port where it rightfully ought to be settled, the adjustment there made will be conclusive as to the items, as well as the apportionment thereof upon the various interests, although it may be different from what our own law would have made, in case the adjustment had been settled in our own ports." (p)¹

Foreign adjustment.

The parties to the adventure are bound by a foreign adjustment.

The principle thus laid down has been established in this country by several decided cases.

Thus, where an adjustment settled at St. Petersburg, the owners of the cargo (British subjects) had been compelled (in order to get possession of their goods) to pay a contribution assessed upon them for the expenses of repairs, which were general average in Russia, but not in this country; it was held that they could not recover it back from the shipowner, who was himself a British subject. (q)

Simmonds v. White, 2 B. & Cr. 803.

The same decision was given in a case, also arising upon a Russian adjustment, where the contribution was for wages and provisions during a refitment, and which, as we have seen, are not general average in this country: here, also, the action was brought by the owner of the goods to recover back the sum so paid against the shipowner, and with the like result. (r)

Dagleish v. Davidson, 5 D. & Ryl. 6.

The reason of the rule is thus given by Lord Tenterden (in the course of his judgment in the case of Simmonds v. White). "The shipper of goods tacitly, if not expressly, assents to general average, as a known maritime usage, and by assenting to it he must be also taken to assent to its

Reason of the rule.

(p) *Peters v. Warren Ins. Comp.* 3 Sumner, 399, 393. S. C. 1 Story, C. C. 463. See 2 Phillips on Ins. 182.

(q) *Simmonds v. White*, 2 B. & Cr. 803.

(r) *Dagleish v. Davidson*, 5 Dowl. & Ryl. 6.

¹ See *Loring v. Neptune Ins. Co.* 20 Pick. 411; *Thornton v. U. S. Ins. Co.* 12 Maine, 153; *Strong v. N. Y. Fireman's Ins. Co.* 11 John. 322; *Depau v. Occell Ins. Co.* 5 Cowen, 63; 3 Kent, (5th ed.) 243, 244; *Lewis v. Williams*, 1 Hall, 430; *Shiff v. Louis. Ins. Co.* 18 Martin, 629; *Peters v. Warren Ins. Co.* 1 Story, C. C. 471; *Abbott, Shipp.* (9th Am. ed.) 508, and notes; *Chamberlain v. Reed*, 13 Maine, 357. Mobile is, it seems, in the adjustment of general average, to be regarded as a foreign port in relation to New York. *Lewis v. Williams*, 1 Hall, 430.

Foreign adjustment.

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*adjustment at the usual and proper place, according to the usage and law of the place."(*s*)

The law in this respect is the same in the United States. (*t*)

The underwriter is bound by a foreign adjustment, when proved to have been settled according to the laws and usages of the foreign port.

§ 351. With regard to the second question, namely, whether the *underwriter*, in this country, is bound by a foreign adjustment, many difficulties have been raised, and it has been strenuously contended by some writers of considerable practical knowledge, both in this country and the United States, that the underwriters should in no case be bound by a foreign adjustment, when either the items of the loss or the modes of apportionment, are different from what they would have been had the adjustment been settled in a home port. (*u*)

Upon general reasonings, however, and from the tenor of the few judicial decisions that have taken place on the subject in this country, the true rule appears to be this:—

1. That the underwriter is in all cases bound by a foreign adjustment of general average, when it is *rightly settled according to the laws and usages of the foreign port*; ¹

2. But that, unless it is *clearly proved* to have been settled in strict conformity with such laws and usages, he is in no case bound thereby, if it would not be general average in this country. ²

Thus, where the assured (owner of goods) had been compelled to pay, under a foreign adjustment settled at Pisa, in respect of losses, some of which would not have been general average in this country, and upon contributory values, differently computed from what they would have been in this country (the goods being assessed at their full value, the ship at one-half, the freight at one-third,) yet, as it *clearly appeared* in evidence that all the losses in respect of which the claim

(*s*) 2 B. & Cr. 810.

(*t*) 3 Kent's Comm. (5th ed.) 243.

(*u*) See especially Mr. Stevens's Essay on Average, 71, 72. 5th ed. Mr. Phillips appears to admit that the underwriters would be bound, even though the contri-

bution should be differently *apportioned*, provided the losses adjusted as general average would be either *general* or particular average at the home port, but not otherwise. 2 Phillips on Ins. 169 - 174.

¹ Peters v. Warren Ins. Co. 1 Story, C. C. 463; Loring v. Neptune Ins. Co. 20 Pick. 411; Strong v. N. Y. Fireman's Ins. Co. 11 John. 323; Depau v. Ocean Ins. Co. 5 Cowen, 63.

² See next page and note.

was allowed *were general average at Pisa*, and that the apportionment of loss was correct according to the mercantile usage of that place, the assured was allowed to recover against his underwriter the full proportionable amount of his claim. (v)

Foreign adjustment.

* 946

Walpole v. Ewer, Park, 898. 8th ed.

So, where the holder of a respondentia bond (on a Danish ship,) who would not have been liable to general average at all in this country, was compelled to pay a contribution under a foreign adjustment, settled in Denmark, and sued his underwriters for his ratable proportion of the amount so paid; satisfactory evidence having been given, that it was the law and practice in Denmark that holders of respondentia bonds should contribute in general average, the plaintiff, under Lord Kenyon's direction, had a verdict for the full amount of his claim. (w)

Lord Kenyon, in deciding this case, put it on the principle, that the underwriter was bound by the law of the country to which the contract *relates*.

In both these cases there was clear evidence that the adjustment was correct according to the law and practice of the port where it was settled: if, however, this be not satisfactorily established on conclusive evidence, the underwriter will not be bound by the foreign adjustment, whenever, either in the items or the apportionment of the loss; it differs from what it would have been if settled in his own country.¹

Where, however, it is not a proper case of general average according to the laws and usages of the foreign port, the underwriter is not bound by a foreign adjustment.

Thus where the owner of goods insured from London to Lisbon was compelled, under a foreign adjustment, settled in Lisbon, to pay a contribution for losses, which, according to the laws of this country, do not belong to general average; and *no sufficient proof was given*, that, by the laws and usages of Lisbon, such losses were treated as general average *there*; it was held that the owner of the goods could not recover

Power v. Whitmore, 4 M. & Sel. 141.

(v) Newman v. Cazalet, Park, 900. 8th ed. (w) Walpole v. Ewer, Park, 898. 8th ed.

¹ 3 Kent, (5th ed.) 244; Lenox v. United Ins. Co. 3 John. Cas. 178. In Thornton v. U. S. Ins. Co. 12 Maine, 150, it was decided, that in an action on a policy of insurance, by the owner of a ship against the underwriters, the adjustment of a general average loss made in a foreign port, is not conclusive upon the owner; but he may show, that items of loss were omitted in such adjustment, which by the laws of Maine, where the contract was entered into, should have been included. So Mr. Chancellor Kent says, — "If it was not a proper case for a general average, and was a partial loss only, then a foreign adjustment, founded in mistake, and assuming a case for general average, when none existed, is not binding." 3 Kent, (5th ed.) 244; Lenox v. United Ins. Co. 3 John. Cas. 178.

Foreign adjust-
ment.

from his underwriter his proportionable amount of the sum so paid. (x) ¹

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It by no means follows from this case, as has been sometimes supposed, that underwriters in this country can in *no* case be bound by a foreign adjustment; for Lord Ellenborough puts his judgment entirely on the ground, that the case contained no allegation of fact, as to its being the law or usage at Lisbon to treat losses and expenses of the kind charged for as the subjects of general average.

With regard to the general question, his lordship says, "This contract (the policy *i. e.*) must be governed in point of construction, by the law of England, where it is framed, *unless the parties are understood as having contracted on the footing of some other known general usage among merchants relative to the same subject, and shown to have obtained in the country where, by the terms of the contract, the adventure is made to determine, and where a general average (if such should under the events of the voyage be claimed) would, of course, be demandable.*"

It appears an almost unavoidable inference from these expressions of his lordship, that, where ship or goods are insured for a voyage from this country to a foreign port, *and sufficient evidence is given of an invariable usage at such port, to adjust, as general average, losses which are not so in this country, the English underwriter is bound thereby, on the ground that he must be taken to have notice of the usage prevailing at the foreign port to which the contract of insurance relates, and by reference to which it ought to be construed.*

The law in the United States upon this subject is to the same effect as stated by Chancellor Kent in the last edition of his Commentaries. (y)

The same conclusion follows on general principles.

In fact, on general principles it seems impossible to arrive at any other conclusion: the law of England, as we have already seen, compels the *owners of the several interests* to pay

(x) Power v. Whitmore, 4 Maule & Sel. 141.

(y) 3 Kent's Comm. (5th ed.) 243. See also the cases collected in 2 Phillips on Ins. 170 - 174.

¹ See Thornton v. U. S. Ins. Co. 12 Maine, 150, 156.

all general average charges assessed upon them by foreign adjustment, if settled according to the law of the port where it is made, whether such charges would be allowed in England or not: now, it seems certain that the *English *underwriter* must be bound by the very terms of his contract to reimburse to the assured their proportion of all such general average charges as they (the assured) have been compelled to pay by the law of England: if this be so, and it appears quite incontrovertible, then it follows by necessary inference, that the underwriter is bound to reimburse all such general average charges as have been assessed on the assured by a foreign adjustment, if correctly settled according to the law of the port of adjustment.

Foreign adjust-
ment.

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The force of the conclusion seems even still greater in cases where the port of foreign adjustment is also *the port of the ship's destination*. In such cases, always supposing the usage of trade to make such charges to be well established, the underwriter must be taken to have had notice of such usage: he contracted, therefore, with reference to it: he must have contemplated the possibility of a loss arising on the voyage, which would be charged for as a general average at the foreign port, which it would not be admitted as such at home. The possibility of the assured being obliged to contribute his share to such loss must have been as much foreseen by the underwriter, at the time of making the contract of indemnity, as the possibility of his having to contribute to a general average *as settled in this country*: he must therefore, on principle, be equally liable to indemnify the assured against the one loss as against the other.¹

¹ In *Peters v. Warren Ins. Co.* 1 Story, C. C. 463, 470, Mr. Justice Story said, — "Now, the contract of insurance is a contract of indemnity against risks and losses by the perils insured against, not only in the home port and on the ocean, but also in foreign ports. It naturally, therefore, looks to general averages, which may be incurred and enforced abroad, as well as at home. If, by a peril insured against, the insured is compelled in a foreign port by the local law, to pay a sum as general average, which, by the law of his own country would not be so, why may not such a loss or charge be properly deemed a general average in the sense of the policy? What difference in principle is there between deciding, that items or apportionments included in a foreign adjustment of a general average, although not belonging to a general average, or a proper apportionment, by the law of our own country, are, nevertheless, to be here paid for as a general average, and deciding that a loss, not a general average by our law, but a general average by the foreign law, and enforced there, is to be deemed and paid for here as a general average? In each case the loss, sought to

SECT. IX. *Liability of the Owners of Ship, Goods, and Freight, for their respective Amounts of Contribution.*

Liability of the owners of ship, goods, and freight, for their respective amounts of contribution.

The sole parties primarily liable are the owners of ship, freight, and cargo.

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§ 352. The average having been thus adjusted, it remains to inquire who are the parties legally liable to pay the proportionate shares of the contribution, and in what mode can such payment be enforced.

Primarily the sole parties liable are the parties upon whose respective interests the contribution has been assessed, *i. e.* the owners of ship, freight and goods. They are liable for the *whole* amount of their respective contributions, and, on *failure to pay, may be proceeded against, either at law or in equity. (z)¹

(z) Abbott on Shipping, 454, 6th ed.

be recovered is, *pro tanto*, not a general average according to our law; and the principle, which is to govern, must be the same, whether the loss be greater or less, whether it apply to the totality of the claims, or to any item thereof. Now, certainly the weight of authority, both in England and America, is, that the items included and the sums apportioned and paid according to the law of a foreign country, as a general average, in an adjustment thereof, made there, (and *a fortiori*, if enforced by the public tribunals there,) are, *quoad* the items and the rule of apportionment, conclusive upon and payable by the underwriters here, as a general average, although not apportioned in the same manner, and not deemed items of general average by our law." "There is nothing unreasonable in construing the engagement of the underwriters in a policy to be, that they will pay, whatever the insured is compelled to pay as a general average, arising from the risks insured against." But see *Thornton v. United States Ins. Co.* 12 Maine, 150, 154, 156.

¹ The case of *Rossiter v. Chester*, 1 Douglas, 154, decided by the Supreme Court of Michigan, arose on a claim for contribution to a general average loss. The loss occurred by throwing overboard a quantity of the plaintiff's goods from a steamer engaged in the navigation of Lake Huron, for the preservation of the vessel and the rest of the cargo. It was admitted that it would have presented a clear case for contribution by the parties interested, among whom was the defendant, if it had happened in the course of a sea voyage. But it was contended by the defendant, that the doctrine of general average was peculiar to the maritime law, and therefore could not take effect beyond the ebb and flow of the tide, and also, that it could not be enforced in a court of common law. The defence was sustained by the court on both grounds. But the case seems to stand alone; because certainly, the cases are frequent in the courts of common law both in England and in this country, where actions have been sustained for contribution to general average losses; and there is no other decision to the contrary; and as to the principle of general average, it is supported by the strongest equities, and is highly beneficial in its operation; and it is truly difficult to perceive how it should be limited in the manner suggested by the above decision. The doctrine of general average was extended to a case of loss coming within its equities, under a policy of insurance against fire, in *Wells v. Boston Ins. Co.* 6 Pick. 182. Mr. Chancellor Kent, stating the rules for adjusting losses under fire policies, says, —

By the ancient sea laws the captain was directed to enforce the payment *immediately* after the adjustment had been made, and to that end was directed to retain the goods on board till payment.

Liability of the owners of ship, goods, and freight, for their respective amounts of contribution.

And, although the general practice now is for the underwriters to pay the amount in the first instance, yet this is a mere matter of convenient practical arrangement, leaving the legal liabilities, and therefore the legal remedies, of the respective parties entirely unaltered. Accordingly, the master has still a lien on the goods till payment of the contribution. (a)

Mode of enforcing payment from them.

Modern practice — master's lien on the goods.

"The general maritime law," says Mr. J. Story, "gives a lien *in rem* for the contribution, not as the only remedy, but in many cases as the best, and in some the only remedy, as where the owner of the goods is unknown. Indeed, it may be asserted with entire confidence, that in many cases, without such a lien, the shipowner would be without any adequate redress, and would encounter most perilous responsibility:" and, accordingly, in the case from which these remarks are cited, it was held in the United States that a shipowner had this right of lien even against goods belonging to the United States government, until reimbursed his proportion of the expenses of saving the cargo, assessed upon that part of it. (b)

In the case of a general ship, where there are many consignees, it is usual, in practice, for the master, before he delivers the goods, to take a bond from the different merchants for payment of their portions of the average, when the same shall be adjusted. (c)

Practice in case of a general ship.

The *consignee*, if he be the owner of the goods, is of course chargeable for his share of the contribution; but a consignee who is not the owner is not rendered liable *by the mere receipt*

Consignee of bill of lading not in all cases liable. *Scarfe v. Tobin*, 3 B. & Ad. 523.

(a) Per Lord Tenterden in *Scarfe v. Sumner*, 308, 312. See 2 Phillips on Ins. Tobin, 3 B. & Ald. 523. { Chamberlain 155.

v. Reed, 13 Maine, 377. } (c) Abbott on Shipping, 462. 6th ed.

(b) † The United States v. Wilder, 3 { (6th Amer. ed.) 506, and in note. }

"So there may be a general average for a sacrifice made by the insured for the common good, in a case of necessity. It is analogous to the law of contribution by co-securities." 3 Kent, (5th ed.) 375, 376. The case from Michigan is a much stronger one for the application of the principle. Indeed, there seems to be no good reason for a distinction, in reference to the rules of general average, between the navigation of the great lakes and rivers of this country and that upon the ocean.

Liability of the owners of ship, goods, and freight, for their respective amounts of contribution.

* 950

The parties' interests are *severally*, and not *jointly*, liable, unless they be *joint* owners.

of them under a bill of lading, unless there be an express condition to that effect in the bill: Lord Tenterden accordingly *suggested, that it might be prudent in future to introduce such an express stipulation into the bill. (d)

The parties severally interested in ship, cargo, and freight, are, as a general principle, *severally*, and not *jointly*, liable for their respective proportions of the contribution: if, however, they be jointly interested, they would, on principle, be jointly liable, and have accordingly been held to be so in the United States. (e)

Hence it also follows, that if one of such joint owners have *insured* his interest separately, and in consequence of his joint liability is obliged to pay his partner's share of the contribution as well as his own, his underwriters will not be liable to reimburse to him their proportion of what he has so paid. (f)

SECT. X. *Liability of the Underwriters to reimburse General Average Contribution.*

Liability of the underwriters to reimburse general average contribution.

The underwriters are not *primarily liable* to contribute, and are only bound to reimburse a *proportional* part of the sums paid in contribution.

§ 353. The underwriters never contribute *directly* to general average losses; they are only bound to reimburse the assured their proportionate or ratable amount of his contribution. (g)

They are not bound to reimburse to him the *full* amount of his contribution, but only that proportion of it which the value of his interest *as insured* bears to its value as estimated for the purposes of contribution (h)¹ and this is obviously just; for the value of the ship or goods, *as between the assured and his underwriter* is either their value in the policy, or else in an open policy, their value at the time and place of the ship's sailing; but their contributory value is, as we have seen, something very different to this; viz. their net value as they reach their owner's hands at the port of discharge. It

(d) Scarfe v. Tobin, 3 B. & Ald. 523.

(g) Boulay-Paty, on Emerigon, vol. ii.

(e) † Sims v. Willing, 8 Serg. & Rawle, p. 6, ed. 1827.

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(h) 2 Phillips on Ins. 74.

(f) See 2 Phillips, Ins. 169.

¹ See Clarke v. United M. & F. Ins. Co. 7 Mass. 365.

is evident, therefore, that the underwriter cannot be at all affected by the latter value, but only by the former.

Liability of the underwriters to reimburse general average contribution.

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*Thus, suppose goods to be insured in the policy for 500*l.*; let their net value at the port of discharge, *i. e.* their contributory value, be 1500. — the amount of contribution paid by them to be 150*l.* — then the underwriter will be liable to re-imburse to the assured on goods, not 150*l.* or the whole of the sum to be contributed, but 50*l.* or a third of that sum, that being the proportion which the value insured (500*l.*) bears to the contributory value (1500.): or, to put the same thing in another way, the owner of the goods (as one of the parties to the contribution) has to pay in contribution 10 per cent. on *their contributory value*; but the underwriter has only to pay to the owner of the goods (as his assured) 10 per cent. on *their value on the policy*.

Supposing the contributory value not to exceed the value insured, the rule of re-imbursement is still the same. Thus, goods valued in the policy at 500*l.* are valued in contribution at 500*l.* The assured has paid in contribution 50*l.* *i. e.* a tenth of the contributory value: the underwriter repays him 50*l.* or a tenth of the value in the policy.

Hence, the rule, "*whatever is paid in contribution, by the excess of the contributory value over the value in the policy, is paid by the assured; but for whatever is paid on a contributory value not exceeding the value in the policy, the assured is indemnified on the proportion insured.*" (i)

The rule is the same in France, where it has been decided in the Cour Royale of Aix (30th August 1822,) that, as between the assured and his underwriter, a general average loss is to be adjusted, either upon the value in the policy, or, in an open policy, upon the value of the goods at the time and place of loading on board. (j)

The rule of the French law the same.

The following observations by M. Boulay-Paty tend to put the whole subject in a clear light: —

"When the object is to ascertain the nature and extent of the legal liabilities to which the underwriter is exposed in consequence of the contribution which has been assessed on *the subject insured, *reference must be had to the policy of*

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(i) 1 Magens, 245, case xix. 2 Phillips on Ins. 167.

(j) Boulay-Paty, on Emerigon, vol. ii. p. 8. ed. 1827.

Liability of the underwriters to reimburse general average contribution.

insurance alone, which is the law really regulating the relations of the parties. The claim of the assured against his underwriter in respect of the contribution is a very different claim from that which he has against his co-adventurers, and flows solely from the stipulations in the policy. Hence the adjustment, as between the assured and the underwriter, ought invariably to be fixed upon the value of the subject insured at the time and place of the ship's sailing, without any distinction in this respect between general and particular average loss." (k)¹

General practice in this country.

In this country the general practice is for the broker who has procured the policy of insurance to draw up an adjustment of the average at the back of the policy, which is commonly paid by the underwriters, in the first instance, without dispute; and the account, as between themselves and the assured, settled afterwards. (l)

(k) Boulay-Paty, on Emerigon, vol. ii. (l) Abbott on Shipping, p. 451, 6th ed. p. 8. ed. 1827.

¹ Where a general average loss has been incurred by the shipowner, which is to be borne by the ship and cargo, if the ship and cargo belong to different persons, then the owner of the ship may recover the whole of his loss of the underwriter without any deduction of the general average due on the cargo. The shipowner in such a case is not bound to trouble himself with any remedies against third parties. *Potter v. Providence Washington Ins. Co.* 4 Mason, 298; *Magrath v. Church*, 1 Caines, 196; *Vandenheuvel v. United Ins. Co.* 1 John. 412; *Watson v. Marine Ins. Co.* 7 John. 57. But see contra, *Lapsley v. Pleasants*, 4 Binney, 502. But where the ship and cargo in such a case are owned by the same person, a different rule may well apply. There, the same hand that loses pays. As between the shipowner and the underwriter on ship, the real loss of the shipowner is only the contributory share of the ship to the loss. The other losses are borne by him as owner of the cargo, for which he directly is liable. If he actually repairs the loss, the expenses paid must be deemed expenses paid as well in his character of owner of the cargo, as of the ship. To declare, that he would in such a case be entitled to recover the whole expenses against the underwriter, would be to decide, that he might recover a sum, which he was bound to pay on his own account; to recover that, which he would be bound immediately to pay back to the underwriter. The law does not justify such a doctrine. *Potter v. Providence Washington Ins. Co.* 4 Mason, 298; *Jumel v. Marine Ins. Co.* 7 John. 412; *Saltus v. Ocean Ins. Co.* 14 John. 137; *Pezant v. National Ins. Co.* 15 Wendell, 453. In general, the adjustment is to be made in the same way, whether the ship, freight, and cargo, belong to the same person, or to different persons. *Jumel v. Maine Ins. Co.* 7 John. 412; *Spafford v. Dodge*, 14 Mass. 66. It makes no difference in the application of the principle of general average contributions, to policies of insurance, that there happens to be no cargo on board, so that there is, in fact, no contribution to be made by the cargo or by freight; for general average does not depend upon the point whether there are different subject-matters to contribute, but whether there is a common sacrifice for the benefit of all who are or may be interested in the accomplishment of the voyage. *Potter v. Ocean Ins. Co.* 3 Sumner, 27.

*CHAP. V.

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OF PARTICULAR AVERAGE.

SECT. I. *General Doctrine of Particular Average.*

§ 354. A particular average loss differs from a general average loss, both as to its cause, and the mode of its compensation.

General doctrine of particular average.

All casual damage, proximately caused by the perils insured against, as distinct from damage purposely submitted to, or affected by the agency and will of man; and all extraordinary expenses (not falling within the head of wear and tear, &c.) which are incurred for the sake of *the ship alone* or *the cargo alone*, as distinct from those incurred for the joint benefit of both, are particular average losses.

Difference between particular and general average losses.

Hence the definition of a particular average loss: that it is *loss arising from damage accidentally and proximately caused by the perils insured against, or from extraordinary expenditures necessarily incurred for the sole benefit of some particular interest, as of the ship alone or the cargo alone.* (a)

Definition of a particular average loss.

The damage so caused, or the expense so incurred, instead of being contributed for by the *general* body of those who are interested in the adventure, falls entirely upon the *particular* owner of the property deteriorated by the damage, or benefited by the expenditure (b); and such owner, if insured, *has a claim against his underwriter in proportion, 1st, to the degree by which the damage sustained, or the expenditure to be refunded, may have diminished the value to him of

Adjustment of particular average.

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(a) Toutes dépenses faites pour le bâtiment seul, ou pour les marchandises seules, et tout dommage qui leur arrive en particulier, autrement que pour le salut commun. Boulay-Paty, Cours de Droit Commercial Mar. vol. iv. p. 481, ed. 1834. Code de Commerce, art. 403. Benecké, Pr. of Indem. p. 165, 166. 2 Phillips on Ins. 192.

(b) Hence the term, "*particular average loss*." Emerigon, chap. xii. sect. 39. vol. i. p. 585, ed. 1827. Mr. Benecké defends the use of the term, as more specific and expressive than "*partial loss*." Pr. of Indem. 425.

General doctrine of particular average.

the property insured ; 2nd. to the sum which the underwriter by the policy has agreed to insure on such property.

Whatever percentage this deterioration may amount to on the value which the property would otherwise have sold for, that same percentage the underwriter is bound to pay to the assured, upon the sum for which, by the policy, he has agreed to stand insurer.

For instance, if goods which have been insured for 500*l.* would have realized in the market to which they were being sent 1500*l.*, but for the occurrence of a particular average loss, which prevents them from selling them for more than 1200*l.*, it is plain that these goods have been deteriorated to the extent of 300*l.*, or one-fifth of the value they would otherwise have realized : the underwriter in such case, is not bound to repay the assured 300*l.*, or the whole amount of the actual loss sustained, but only 100*l.*, or a fifth part of the sum for which the goods were insured ; that is, he is bound to pay the assured the same proportion of the sum insured, as the damage may have deducted from the value they would otherwise have realized. (c)

When the terms "partial loss" and "particular average loss" should respectively be employed.

The losses which form the subject of this chapter are frequently, *when the extent of damage done to the merchant's property is chiefly regarded*, called *partial losses*, to distinguish them from total losses, which involve not the partial deterioration of the subject insured, but its entire destruction.

When the *mode of their adjustment is chiefly regarded*, they are called *particular average*, to distinguish them from general average losses, in order to get rid of all notion of contribution, and to show that the *particular* owner, or his underwriter, is alone liable for the loss. (d)

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* The latter term is also more appropriately applied to all those losses which arise out of disbursements for the benefit of a particular interest.

On the employment and meaning of the term *average losses*.

In practice, the term *average losses*, without any addition, is frequently employed to designate all losses which, in respect to their extent, are less than total, and, in respect to their cause and mode of compensation, are distinct from

(c) The word *average* denotes both the damage done to the merchant's property, and also the proportion of the sum or value insured, which the underwriter pays as an indemnity for such damage.

(d) Emerigon, chap. xii. sect. 39, vol. i. p. 585, ed. 1827.

general average; it is in this sense that the word average is used, as we have already seen, in the common memorandum. Although the use of the word is, *prima facie*, objectionable, as tending to create confusion, yet its meaning is now so well fixed by usage as to leave no possibility of misapprehension on the part of practical men, and it has become so completely naturalized in our legal language, that an attempt to substitute any other expression might produce the very embarrassment it was designed to remove. With regard to the etymology of a word which has baffled the research and ingenuity of Emerigon and Benecké (*e*), would be mere laborious trifling to offer any conjecture: it appears in the French language, from which, no doubt, it was adopted into our own, to bear familiarly the meaning which appears to be its correct mercantile import in this country, viz. damage done to ship or cargo by sea perils, or, as it is laid down by the highest authority amongst our practical writers on this subject, when applied to perishable articles, it means deterioration or loss "*by the effects of sea water.*" (*f*)

General doctrine of particular average.

SECT. II. *What Losses are adjusted as a particular Average on Ship, Goods, and Freight.*

As far as relates to the *cause* of loss we have already investigated the principles and collected the examples of particular average losses in treating of those risks and losses which are covered by the policy: on this part of the subject *it will be only necessary to say, that all damage sustained at sea by ship and cargo, which does not involve their total destruction or privation, whether actual or constructive, gives the assured a claim against his underwriters, subject to the conditions and limitations by which the responsibility of the underwriter is modified and controlled. Of these conditions the principal are: — That the damage which is the subject of the claim must appear to have been *proximately caused* by the perils insured against — That it must not have arisen either from the ordinary *wear and tear* of the voyage, or from

Losses adjusted as particular average.

What losses are particular average generally.

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(*e*) Emerigon, chap. xii. sect. 39, § 41. vol. i. p. 536, ed. 1827. Benecké, Pr. of Indem. 167, and 425.

(*f*) Stevens on Average 233-237, 5th. ed. See especially his report of the case, of Hedberg v. Pearson, p. 237, (note 1.)

Losses adjusted
as particular
average.

the *inherent vice* and defect of the subject insured — That it must not have been directly brought about by the negligence or misconduct of the assured and his agents. When the foundation of the claim against the underwriter consists in expenditures incurred in the course of the voyage, it must appear that these expenditures were — 1. necessary; 2. extraordinary (that is, necessitated by some *casualty*, not by the mere common occurrences of an average voyage); 3. incurred for the benefit of the ship alone, or the cargo alone.

It would, therefore, be merely to repeat what has been elsewhere stated, if we attempted in this place to enumerate all the cases that give a claim for particular average loss on the different subjects of insurance: it may be useful, however, to state a few of the decided points as to what does or does not constitute such a claim, more especially with regard to expenditures and disbursements.

ART. 1. *Particular Average Losses on Ship.*

Expenses of
repairs.

Cost of replacing
goods sold.

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Wages and provisions during
repairs and detention.

§ 355. The expenses of repairs necessarily incurred in a port of distress are a particular average loss on *ship*, and always adjusted as such, as we shall see in the next section (*g*)¹: it should seem also, that if goods have been necessarily sold in order to defray such repairs, the cost of replacing them, at the price they would have fetched at the port of destination, is added to the cost of the repairs, and forms part *of the average claimable by the shipowner for the underwriter on ship. (*h*)

The expense, however, of wages and provisions of the crew during repairs(*i*), or during detention by embargo or quarantine(*j*), are not recoverable by the shipowner from his

(*g*) Sect. 3, art. 2. Adjustment of Particular Average Loss on Ship. 8th ed. Eden v. Poole, *ibid.* 107. Latward v. Curling, *ibid.* 268.

(*h*) Sect. 3, art. 2. Adjustment of Particular Average Loss on Ship. (*j*) Robertson v. Ewer, 1 T. Rep. 127.

(*i*) Fletcher v. Poole, Park on Ins. 115,

¹ The expenses of raising a vessel, placing her in a condition for repair, and repairing her, fall under the denomination of particular average. Insurance Co. v. Fithugh, 4 B. Munroe, 160. See Giles v. Eagle Ins. Co. 2 Metcalf, 140; Orrok v. Commonwealth Ins. Co. 21 Pick. 456.

underwriters as an average loss in this country, though they are in France (*k*) and in the United States. (*l*)

Particular average on ship.

The principle of these cases is thus stated by Mr. Benecké:—"The owner *owes* the services of his crew to the freighter and to the ship herself during the *whole* voyage, and consequently, also, during the time of repairs and detention, which is a part of it, and he cannot call upon his underwriter for expenses which are foreign to the contract of insurance." (*m*) Expenses caused by a detention of the *cargo*, in consequence of a mistake in the ship's manifest, there being no detention of, or suit against, the ship, are not recoverable against the underwriter on ship. (*n*)

Expenses caused by detention of cargo

Damages assessed by arbitrators on a shipowner as his moiety of expenses caused by collision do not, in this country, give a claim, as for an average loss, against underwriters on ship. (*o*)

Thus much with regard to *charges and expenses*: as to what losses by sea damage or other casualties are recoverable as particular average against the underwriter on ship, the reader is referred to the chapters which treat of the Risks covered by the Policy and Losses by the Perils insured against, especially to the second section of the former chapter, which contains an attempt to point out what losses on ship are *average*, and what *wear and tear*. (*p*)¹

(*k*) Code de Commerce, art. 403.

(*l*) 1 Phillips on Ins. 640 - 642, vol. ii. 195 - 197. { *Ames*, 849, 850, 911. }

(*m*) Benecké, Pr. of Indem. 462.

(*n*) Bradford v. Levy, 2 C. & Payne, 137. Ry. & Mood. 331.

(*o*) De Vaux v. Salvador, 4 Ad. & Ell.

420; *aliter* in U. St. † Peters v. Warren, Ins. Comp. 3 Summer 269.

(*p*) Part III. Chap. I. Sect. 2, p. 758 - 760, *supra*. See also generally Chap. II. - On Losses by the Perils insured against; and see especially the whole subject well treated by Stevens on Average, 159 - 160, 5th ed.

¹ In a case of a ship's being strained, and accordingly weakened, and injured in consequence of stranding, Mr. Justice Baldwin said, - "Invisible, uncertain, and conjectural damages are never the subject of remuneration. I apprehend the injury is not the subject of adjustment unless it be capable of repair in the ordinary course of business." Sage v. Middletown Ins. Co. 1 Conn. 239. And so it was held by the Supreme Court of Massachusetts, that underwriters are not answerable for indefinite straining and deterioration, which cannot be repaired, and of which no specific estimate or evidence can be given. Feele v. Suffolk Ins. Co. 7 Pick. 254; Orrok v. Commonwealth Ins. Co. 21 Pick. 456; Sewall v. U. States Ins. Co. 11 Pick. 92. But in Giles v. Eagle Ins. Co. 2 Metcalf, 140, there was a claim for "damage of hogging and strain" over and above the expense of repairs and other usual charges. The facts relating to this claim were, that the insured repaired the vessel after the

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*ART. 2. *Particular Average Losses on Goods.*Particular average on goods.

§ 356. What constitutes an average loss on goods, by reason of sea damage or other perils insured against, has already been seen in the two chapters treating of the Risks covered by the Policy, and Losses by the Perils insured against: we will here confine our attention to certain charges which have been decided not to give a claim as for an average loss against the underwriters on the goods.

Loss by having to pay freight on sea-damaged goods arriving in bulk.

It is a fixed principle of this branch of our insurance law, that the *underwriter on goods is not responsible, under the common form of policy, for the loss the merchant may incur by having to pay the same freight on sea-damaged goods arriving in bulk at their port of destination, as he would have had to pay had they arrived there sound.* The risk of loss arising

damage, to the extent of making her seaworthy, and she had been constantly employed, and had performed her voyages well, and was insured at the same premium and at the same valuation after, as she was before she received the damage. But the insured had a survey called; after she was thus repaired, to estimate the damage, which had not been repaired. And it was proved that the whole body of the vessel was injured; that some of the timbers were lifted, some of her trenails started, and that the injury from the strain or hogging could not be perfectly repaired except by rebuilding her; that the hogging remained after the repairs, and that it affected not only the beauty but also the strength of the vessel, and the damage from the hogging and strain was estimated from eight hundred to one thousand dollars. The jury found a verdict for eight hundred and thirty-five dollars. The question before the whole court was on the allowance of this item. Putnam, J., delivering the opinion of the court, said;—"The case is not without its difficulties. The assured cannot be permitted to claim for unseen and imaginary damage; for there can be no standard to measure the correctness of the estimate, and the result would frequently be an allowance against the insurers commensurate with the wants to make up a total loss, wherewith to charge the underwriters. But in the case before us, in consequence of the damage within the perils of the policy, some of the timbers have been lifted, and a vessel, that is found to have been one of the first class, is left, after her repairs, so misshaped as essentially to affect her value. There is no room for mistake about the main fact. She is obviously so much hogged as not to be perfectly repaired, unless by rebuilding her. She has been made seaworthy; but it is in evidence that she is not so strong as she would be if she were as straight as she was built. Now, the insured is entitled to an indemnity. How can it be said that the plaintiffs are indemnified, if compensation should not be made for this damage? We do not intend to shake the doctrine, which we have recognized touching imaginary or theoretical strains. It may be, theoretically speaking, that whenever a ship takes the ground, all her timbers, from the keel to the water-ways, must, of necessity, be in some degree disjoined. But this is not such a case. Here the damage is actual, visible, and tangible. And if this vessel should hereafter take the ground, or encounter extraordinary seas, it is not to be expected that she would stand the shock as well as if her timbers had not been lifted and disjoined." The claim was allowed.

from this cause is wholly foreign to the underwriter *on goods*. This principle was acted upon by Lord Mansfield in the leading case of *Baillie v. Moudigiani*, where his lordship said, "As between the owners of the goods and the underwriters on the cargo, the latter have nothing to do with the freight;" and he, accordingly, in that case, held that the merchant could not claim as an average from the underwriters on *goods*, a charge for *pro rata* freight which he had himself paid to the shipowners (after capture of ship and cargo and subsequent restitution of the proceeds of the goods,) in respect of that part of the voyage performed before the capture. (q) ¹

Particular average on goods.

Or on *pro rata* freight.

Where the ship puts into a port of distress to refit, and sea-damaged goods, having been necessarily unloaded in order to enable her to be repaired, are, on survey, sold there, because it is found that, if reloaded and sent on, they would probably perish, from the progressive increase of decay, before arriving at their port of destination, it is stated by Mr. Stevens that *the full freight due on these goods and sacrificed by the shipowner is, in practice, settled as an average loss by the underwriters on the *goods*, because the sale was for their benefit (r): this, of course, assumes that the ship, with the residue of her cargo, ultimately arrives at the port of destination, so as to be in a condition to have earned full freight had the goods been sent on: if she do not do so, but is either lost on the homeward voyage, or, after being repaired, sails on another, as in such case no freight would in any event have been at all earned, it should seem clear that no liability in respect of freight could be thrown on the underwriters on goods. (s) If the merchant, or his agent, at the intermediate port, by acceptance of the goods there, or otherwise, gives

Freight on goods necessarily sold in port of distress.

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(q) *Baillie v. Moudigiani*, Park, 116, 8th ed. Mr. Bence, admits the practice 8th ed. Abbott on Shipping, 443, and to be so, but doubts the soundness of the 445, in notes to 6th Am. ed. See also per Story J. as cited in 1 Phillips on Ins. 762. (r) *Vlierboom v. Chapman*, 13 M. & Wels. 230.

(r) Stevens on Average, 81 - 263, 264,

¹ See *Case v. Baltimore Ins. Co.* 7 Cranch, 338; *Columbian Ins. Co. v. Catlett*, 12 Wheaton, 363; *S. P. Gilson v. Phil. Ins. Co.* 1 Binney, 405; *Marine Ins. Co. v. United Ins. Co.* 2 John. 186; *Armroyd v. Union Ins. Co.* 3 Binney, 437.

Particular average on goods.

Extra charges of transhipment where goods sent on for the benefit of the merchant.

the shipowner a claim for *pro rata* freight, the amount of such freight ought, at all events, to be deducted from the amount to be paid by the underwriter on goods. (t)

Where, in such case, the original ship is disabled, and the goods, instead of being sold on the spot, are forwarded in a substituted ship, it has been made a question, supposing the expense of sending on the goods in the second ship exceeds the freight which would have been payable for their transport in the first ship, by whom the extra expense is to be borne: the rule in France, and also, as it seems, in the United States, is, 1. that the extra freight shall be borne by the merchant *whenever it is for his benefit that the goods should be so forwarded*; and 2. that the charge of such increased freight is, in such case, to be settled as an average loss by the underwriters on the goods. (u)¹ Lord Denman, after a very learned examination of all the authorities (in the case of *Shipton v. Thornton*), seems to acquiesce in the first of these positions, but intimates no opinion as to the chargeability of the underwriters on the goods; so that the latter point must still be considered an open one in our jurisprudence. (v)

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May not the rule be, that when the goods are clearly sent on for the benefit of the merchant, the underwriter on goods would be liable; but when sent for the purpose of earning freight, then the charge would fall on the underwriter on freight?

Loss on sale of goods to repair ship.

Where goods are necessarily sold by the master in a port of distress to defray the expenses of repairing the ship, the loss sustained from the sale by the shipper of the goods may be recovered by him against the owner of the ship, but

(t) In the absence of any act, or acceptance by the merchant or his agent, no freight at all will be due on such sale, even though necessary; the necessity of the case does not constitute the master an agent of the shipper to sell, so as to give the owner a claim to freight, *Vlierboom v. Chapman*, 13 M. & Wels. 230.

(u) For the French law, see Emerigon,

chap. xii. sect. 16, vol. i. p. 426, and the commentary of Boulay-Paty, *ibid.* ed. 1827. For the Law in the United States, see 1 Phillips on Ins. 702, 703. 8 Kent's Comm. (5th ed.) 212, note a.

(v) See the judgment of Lord Denman in *Shipton v. Thornton*, 9 Ad. & Ell. 326-338.

cannot be claimed as an average loss from the underwriter on goods. (w)¹

Particular average on goods.

The expenses incident to the sale by auction of sea-damaged goods are, as we shall see in treating of adjustment, added to the average loss payable by the underwriters on goods. (x)

Expenses of damaged sales.

ART. 3. *Partial Losses and Charges on Freight, &c.*

§ 357. As Mr. Stevens remarks, the word "average" is very inapplicable to claims for partial losses on freight, which, in fact, can only arise from one cause, viz. *a total loss on part of freight* (y): we have headed this article accordingly.

The word "average" inapplicable to freight.

It seems in this country, that a claim in respect of partial loss on freight can only be made good when either, 1st, only part of the full intended cargo out of which the freight was expected to arise was on board, or contracted for at the time of loss (z); 2nd, when some separable part of the whole cargo shipped is washed clean out of the packages that contain it, or goes in bulk to the bottom of the sea. (a) In both these cases there is a clear total loss of part, or partial loss, of freight, which must be adjusted by the underwriter in the mode hereafter to be indicated.

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In the following case it was decided that a justifiable sale by the master of part of the cargo at an intermediate port, whereby the freight of such part was lost to the shipowners, did not give them a claim against the underwriters on *freight* as for a total loss of part.

Loss of freight on part of cargo, justifiably sold by master at the port of shipment, is not an average on the underwriters on freight.

A ship, the freight of which was insured for a voyage "from Kingston, in Jamaica, to Liverpool," sailed from Kingston with a full cargo of cotton, coffee, and other colonial produce: but soon afterwards, from the starting of a plank in violent weather, was forced to put back, and, for the

Mordy v. Jones, 4 B. & Cr. 394.
6 D. & Ry. 479.

(w) *Powell v. Gudgeon*, 5 M. & Sel. 431. *Sarqy v. Hobson*, 2 B. & Cr. 7. 3 Dowl. & Ry. 192. S. C. 4 Bingh. 131. 12 Moore, 474.

(x) *Post*, 973.

(y) *Stevens on Average*, 174. *Brookelbank v. Sagrue*, 1 Moo. & Rob. 102.

(z) *Forbes v. Aspinall*, 13 East, 323. *Forbes v. Cowie*, 1 Campb. 320.

(a) *Stevens on Average* 174.

¹ See *Giles v. Eagle Ins. Co.* 2 Metcalf, 140.

Partial loss,
and charges on
freight.

purposes of repair, to unload the whole of her cargo. After the ship was repaired, and about proceeding on her voyage again, it was found that part of the cargo had been so wetted by sea water, in consequence of the starting of the plank, that it could not be reshipped without danger, from ignition, to the ship and rest of the cargo, except after a process of washing with fresh water and drying in the sun, which would have detained the vessel six weeks, and been attended with expense equal to the freight. Under these circumstances, the master, acting as a prudent man would if uninsured, sold the damaged goods, *with the approval of the shippers* (who, however, refused to interfere); and, finding he could not obtain other goods to complete his cargo in reasonable time, and being pressed by the shippers of the rest to proceed, he sailed for Liverpool with the net proceeds of the damaged goods, which he paid over to the parties interested, without retaining freight: the shipowner claimed from the underwriters a total loss on the freight of the part of the goods so sold. The Court of King's Bench held that the underwriter on freight was not liable to this claim, chiefly upon the ground of the mischief that might arise if, by a contrary decision, they were to hold out a temptation to *masters to sail away under circumstances like these, instead of stopping until the goods could be reshipped. (b) ¹

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Loss where
only *pro rata*
freight earned.

Where only freight *pro rata* is earned, the loss on freight in the United States is adjusted as a *salvage loss*, i. e. the underwriter pays the whole amount of the insurance, deducting the *pro rata* freight. (c) ² And the practice in England would appear to be the same.

Expenses of
reshipping and
forwarding cargo.

When a ship has put into a port of distress for repairs, and to that end the cargo is obliged to be unloaded, the charges of unshipping and reshipping the cargo will generally fall

(b) *Mordy v. Jones*, 4 B. & Cr. 394. 6 D. & Ryl. 479. The ground of decision assumed by Lord Tenterden seems hardly satisfactory, as Mr. Phillips has pointed out, when applied to the circumstances of the particular case. 1 Phillips on Ins. 706.

(c) † *Coolidge v. Gloucester, Merc. Ins. Comp.* 15 Massachusetts Rep. 345. 2 Phillips on Ins. 208-210.

¹ See *M'Gaw v. Ocean Ins. Co.* 23 Pick. 405; *Jordan v. Warren Ins. Co.* 1 Story, C. C. 342; *Griewold v. N. York Ins. Co.* 3 John. 221; *Center v. Amer. Ins. Co.* 7 Cowen, 564; S. C. 4 Wendell, 45.

² See cases cited in next note, above.

upon the underwriter on *freight*. (d) So, where a ship was detained, and her homeward cargo unloaded, under embargo of the foreign government in whose port she was preparing for her homeward voyage, it was held that the expenses of reshipping this cargo, after the embargo was taken off, whereby she was ultimately enabled to earn freight, ought to be deducted from the freight paid over to the underwriters after the adjustment of a total loss. (e) The charges of wages and provisions, however, incident to such detention, or to a delay for repairs, seem to be no more chargeable on the underwriter on *freight* than on the underwriter on ship, and for the same reason. (f)

Partial loss,
and charges on
freight.

Wages and pro-
visions during
detention.

It has been decided in this country, that if a ship ultimately earn freight, though not that intended for her, the expenses of a delay or detention in the course of the voyage, by reason of some of the perils insured against, as for repairs, by being icebound, &c., do not constitute a claim for an average loss against the underwriters on freight (g): but the *expenses of putting such substituted cargo on board at a port of distress, are to be deducted from the freight paid over as salvage to the underwriters who have adjusted as for a total loss. (h)

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Where the original ship is lost or disabled, and the goods are sent on by the master in a substituted ship, for the *benefit of the owner of the goods*, the extra expenses of transshipment, beyond the cost of the original freight, may perhaps be thrown on the underwriters on the goods;¹ if, however, they were sent on for the *sole purpose of earning freight*, these expenses should be borne by the underwriter on freight. (i)

Extra charges
caused by trans-
shipment of
goods where
original ship is
disabled.

(d) *Stevens on Average*, 23, and 172, 5th ed.

(e) *Sharp v. Gladstone*, 7 East, 24: in this case, however, there had been an abandonment.

(f) The contrary was supposed to have been intimated by Mr. J. Buller in *Edra v. Poole*, as reported by Park on Ins.; but the report was found incorrect by Mr. East, as stated by him in a note to *Sharp v. Gladstone*, 7 East, p. 32. The

law is the same in the United States. See the cases cited, 2 Phillips on Ins. 212, 213. See also *Everth v. Smith*, 2 M. & Sel. 278.

(g) *Brockelbank v. Sugrue*, 1 Mod. & Rob. 102. See S. P. as to salvage, loss of freight, *Everth v. Smith*, 2 M. & Sel. 278.

(h) *Barclay v. Stirling*, 5 Maule & Sel. 6.

(i) *Benecká, Fr. of Indem.* 448, 449.

¹ See 3 Kent, (5th ed.) 338; *Mumford v. Commercial Ins. Co.* 5 John. 262; *Searle v. Scovell*, 4 John. Ch. 218; *Dodge v. Marine Ins. Co.* 17 Mass. 471.

Partial loss,
and charges on
freight.

Partial loss on
profits.

Mr. Phillips mentions an instance in which *the expense of transporting the goods* in such case *by land* was settled in Boston as an average loss by the underwriters on freight. (j)¹

With regard to profits, it has been held in the United States, that, when the goods, out of which the profits are to arise, arrive sea-damaged, or a part of them are totally lost, this is *pro tanto* a partial loss on the profits, and to be adjusted accordingly (k); and the same has been there held where part of the goods have been necessarily sold. (l)

SEC. III. Of the adjustment of Particular Average.

ART. 1. Adjustment of Particular Average Loss on Goods.

Adjustment of
particular average
loss on goods.

Principles on
which adjustment of average
loss on goods
depends.

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§ 358. The true method of ascertaining the amount which the underwriter ought to pay, in order to indemnify the assured for a particular average loss on goods arriving sea-damaged, depends mainly upon the following elementary principle of insurance law; viz. *That the value upon which the premium is paid is, as between the assured and the underwriter, the sole value to be regarded in estimating the amount of the underwriter's liability: he pays no loss upon that for which he receives no premium.* (m)

Now, in a *policy on goods*, unless otherwise stipulated, this value is either, in an *open policy* *their prime cost* (i. e. their invoice price at the port of loading,) together with all expenses till put on board, including premium and costs of

Stevens on Average, 175. 5th ed. So determined in the United States, in † *Salut v. Ocean Ins. Comp.* 12 John. Rep. 107. † *Schieffelin v. New York Ins. Comp.* 9 *ibid.* 21. 2 Phillips on Ins. 208.

(j) 2 Phillips on Ins. 211.

(k) † *Loomis v. Shaw*, 2 John. Cases, 36. < See 3 Kent, (5th ed.) 337, in note. *Patapco Ins. Co. v. Coulter*, 3 Peters (S. C.) 222. >

(l) † *Wain v. Thompson*, 9 Serg. & Rawle Rep. 115.

(m) In order to avoid all misconception, let it be remembered *that each separate underwriter pays only upon the actual sum by him subscribed*. Thus, if five underwriters have each subscribed a 200*l.* policy on goods valued at 1000*l.* and the goods arrive damaged one-fourth, each underwriter will have to pay 50*l.* as his quota to make good this loss, i. e. one-fourth of 200*l.*: the five underwriters will pay collectively 250*l.* or one-fourth of 1000*l.* the amount of the whole valuation.

¹ See *Bryant v. Commonwealth Ins. Co.* 6 Pick. 131.

insurance (n), or else, in a *valued* policy, the value expressed in the policy: hence the sole basis upon which a particular average loss on goods can be adjusted is, as regards the underwriter, either their *prime cost on board*, or their *value in the policy*. (o)

Adjustment of particular average on goods.

We have already proved elsewhere, that in valued policies the valuation in the policy is the sole standard of the underwriter's liability in all cases of particular average loss, except where it is fraudulent or grossly excessive (p), or where only part of the full intended cargo to which alone the valuation was meant to apply has been shipped on board at the time of loss. (q)

Valuation in policy *generally* the sole basis of adjusting average loss.

From this principle it follows, that the amount which the underwriter has to pay, in respect of a particular average loss on sea-damaged goods, cannot at all depend upon the higher or lower market-price which such goods may fetch in their port of destination or arrival.

Amount of loss payable by underwriter ought not to vary with the rise and fall of the markets at the port of arrival.

For this market-price at the port of destination is a very different thing from their *prime cost on board at the port of loading*, or (it may be) from their value in the policy,—the sole basis, as we have just seen, on which the loss is to be adjusted as regards the underwriter. The market-price of goods at their port of arrival is the price at which the merchant can afford to sell them there to a consumer, after paying freight and all charges, and either realizing a profit or submitting to a loss; this price therefore is composed of three constituent parts, 1. Prime cost on board; 2. Freight duty and landing charges; 3. Profit in a gaining, or loss in a losing, market. (r)

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- (n) *Taite v. Royal Exch. Ass. Comp.* Park, 224, 225. 8th ed. *Usher v. Noble*, 12 East, 639. *Waldron v. Coombe*, 3 Taunt. 162. { *Cox v. Charleston Fire & Marine Ins. Co.* 3 Rich. 331. *Ins. Co. v. Bland*, 9 Dana, 143. *Bailey v. S. Car. Ins. Co.* 3 Brevard, 354. *Le Roy v. United Ins. Co.* 7 John. 343. *Gahn v. Broome*, 1 John. Cas. 120. *Minturn v. Columbian Ins. Co.* 10 John. 75. *Ogden v. Columbian Ins. Co.* 10 John. 273. Goods laden at a foreign port should be valued at their invoice prices there. *Coffin v. Newburyport Ins. Co.* 9 Mass. 436. }
 (o) *Usher v. Noble*, 12 East, 639. *Taite v. Royal Exch. Ass. Comp.* Park, 224, 225. 8th ed. Marshall, 232. *Stevens on Average*, 178. 5th ed. *Benecké, Pr. of Indem.* 12-14.
 (p) See Chapter on Valuation, Part I. Chap. XI. *ante*.
 (q) *Forbes v. Aspinall*, 13 East, 323. *Rickman v. Carstairs*, 5 B. & Ad. 657.
 (r) *Benecké, Pr. of Indem.* 3. *Stevens on Average*, 85. 5th ed.

Adjustment of particular average on goods.

Now, it is the first of these alone, *i. e.* *prime cost*, or value in the policy, with which the underwriter *on goods* is concerned: he has not insured against loss by freight, &c.; he has not insured against loss of expected profit. In the language of Lord Mansfield, he only "engages, so far as the prime cost or value in the policy, *that the thing shall come safe* : — he has no concern with any profit or loss which may arise to the merchant from the goods: he has no concern with any subsequent value." (s)

Principle of indemnity in case of sea-damaged goods.

The principle, in fact, of indemnity, as practically adopted in this country, is, as we have already seen, *that the underwriter on goods does not engage to put the merchant in the same condition he would have been in had his goods arrived safely at the port of destination, but solely to put him, in regard to such goods, in the situation in which he was at the beginning of the risk.* (t) ¹

Distinction between the actual amount of depreciation and the consequent amount of indemnity.

There is, therefore, an important distinction running through the whole of this branch of insurance law; viz. *that the extent of loss the assured on goods sustains by the sea-damage is one thing, the amount which the underwriter has to pay in respect thereof is quite another*: accordingly, when goods arrive sea-damaged, two points are to be ascertained; *first*, the extent of depreciation in value which the *goods have suffered; *secondly*, the amount which the underwriter ought to pay in respect thereof.

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Mode of ascertaining the extent of depreciation on goods arriving sea-damaged.

The first point is ascertained by simply comparing the price for which the goods would have sold in the market, had they arrived there sound, with the price for which they actually do sell, arriving there damaged.

Sound and damaged sales.

Generally speaking, in practice, the damaged goods are actually sold by public auction, and the amount they realize is called the *proceeds of the damaged sales*; the value which they would have sold for, if sound, is estimated by supposing them to be sold at the current price for sound articles of the same kind in the same market, and the amount supposed to

(s) *Lewis v. Rucker*, 2 Burr. 1170.
Stevens on Average, 119. 5th ed.

(t) See Part I. Chap. XI. on Valuation.

¹ See 3 Kent, (5th ed.) 335; *Bradlie v. Maryland Ins. Co.* 12 Peters, 378.

be realized by these *pro forma* sales is called the proceeds of the sound sales. (u)

Adjustment of particular average on goods.

The difference, then, between the market-price of the sound and the market price of the damaged goods, or, in technical language, between the *sound and damaged sales*, gives the direct amount of the merchant's loss.

But this cannot be the amount the underwriter has to pay: for, first, it would make the *market-price* of the goods at the port of destination the basis of the underwriter's liability, when, as we have just seen, the only true basis of such liability is *their prime cost at the port of loading*; secondly, it would involve the underwriter in the rise and fall of the markets with which, as we have also seen, he has no concern; that is, for the same amount of sea-damage he would have to pay *more* when the goods come to a *gaining*, and *less* when they come to a *losing*, market (v); while the desideratum is, to obtain some uniform measure, or standard of value, by which the amount the underwriter has to pay, in respect of a particular loss on damaged goods, shall be always the same when the proportional extent of damage is the same. (w)

Mode of ascertaining the proportionate amount of indemnity payable by the underwriter.

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The object, then, in comparing the proceeds of the sound and damaged sales for the purposes of indemnity under the policy, is not to ascertain the *direct amount* of the merchant's loss, but its *relative* amount—the proportion, that is, which it bears to the price at which the goods would have sold if sound; the question being, not whether the depreciation amounts to any given *fixed sum*, but whether it amounts to

Mode in which the ascertained percentage, or proportion of depreciation, is applied to the sum insured, in order to ascertain what the underwriter has to pay.

(u) Benecké, Pr. of Indem. 435. Stevens on Average, 83–85. 5th ed.

(v) This will be obvious from the following example. Take the following data.

Let the prime cost of the goods be 500*l*. The amount of loss by sea-damage be half the sum for which they would have sold, if sound. The profit or loss be half the prime cost.

Then take,

(1) A losing market.

Goods, if sound, would have sold for	
half prime cost	£250
Being damaged, did sell for half that	
sum	125
Difference between sound and dam-	

aged sales (i. e. merchant's loss) £125

The underwriter on a losing market would, on this principle, pay 125*l*.

Take next,

(2.) A gaining market.

Goods, if sound, would have sold	
50 per cent. above prime cost	£750
Being damaged, did sell for half that	
sum	375

Difference between sound and damaged sales (merchant's loss) £375

The underwriter on a gaining market would pay 375*l*. though the amount of deterioration is the same in both cases.

(w) Stevens on Average, 119, 5th ed.

Adjustment of
particular average
on goods.

Rule of Lord
Ellenborough
in *Usher v.
Noble*.

one half, one fourth, or one tenth of the sum for which the goods would have sold if sound; whether, in a word, the commodity is one half, one fourth, or one tenth the worse for the sea-damage; when this is ascertained, the liability of the underwriter is ascertained also; for he pays the same proportional part, whether it be one half, one fourth, or one tenth of the prime cost, or value in the policy.

"The difference between the sound and damaged sales affords the proportion of loss in any given case, *i. e.* it gives the aliquot part of the original value which may be considered as destroyed by the perils insured against; when this is ascertained, it only remains to apply this liquidated proportion of the loss to the standard by which the value, as between the assured and the underwriter, is calculated, (*i. e.* the prime cost or value in the policy,) and you have the one half, the one fourth, or the one tenth of the loss in terms of money." (x)

Thus, the sum which the underwriter will have to pay will depend solely on the relative extent of the loss, and will be the same whether the goods arrive at a gaining or a losing market. (y)

In short, that which the assured loses by the depreciation of his goods is an aliquot part of the market value for which they would have sold had they arrived sound at their port of destination; that which the underwriter pays in respect of such loss is the same aliquot part of their prime cost, or value in the policy: thus, if the damage amounts to half the sound value of the goods, the underwriter pays half the sum he has agreed to

(x) Per Lord Ellenborough in *Usher v. Noble*, 12 East, 647.

(y) Take the same data as in note v. *i. e.* let the prime cost be 500*l.*; the depreciation, half the value of the sound sales; the profit or loss, half the prime cost.

Then,

(1) On a losing market.
Produce of sound sales (there being
50 per cent. loss on prime cost) £250
Produce of damaged sales (being half
the sound value) - - - 125
Difference between sound and dam-
aged sales (*i. e.* merchant's loss) £125
But 125*l.* is one half, or 50 per cent. on

250*l.* (the proceeds of the sound sales);
the underwriter pays one half, or 50 per
cent. on 500*l.* (the prime cost,) *i. e.* he
pays 250*l.*

(2) On a gaining market.

Produce of sound sales (being 50 per
cent. over prime cost) - - - £750
Produce of damaged sales (being half
the sound value) - - - 375

Difference between sound and dam-
aged sales (*i. e.* merchant's loss) £375

But 375*l.* is one-half, or 50 per cent. on
750*l.* (the proceeds of the sound sales);
the underwriter pays one-half, or 50 per
cent. on 500*l.* (the prime cost,) *i. e.* he
pays 250*l.* as before.

insure; if to a third, then he pays a third of that sum, and so on in exact proportion to the extent of the depreciation. (x) Adjustment of particular average on goods.

§ 359. Even after this rule of adjustment was established, it was for some time doubted whether the amount of depreciation on the sea-damaged goods was to be ascertained by comparing together the *net* or the *gross* produce of the sound and damaged sales: the question came on for consideration in the Court of King's Bench, when it was established by Mr. J. Lawrence, in one of the ablest judgments ever delivered in Westminster Hall, that the true rule of adjustment is, *that the percentage, or aliquot part, which the underwriter has to pay of the prime cost or value in the policy, must be ascertained by comparing the gross produce of the sound, with the gross produce of the damaged, sales (a)*; and this is now invariably acted on in practice as the true rule of adjustment.¹

The true rule of adjustment is to ascertain the percentage of depreciation, by comparing the *gross* produce of the sound, with the *gross* produce of the damaged, sales, and applying this percentage to the prime cost or value in the policy.
Johnson v. Shedden,
2 East, 581.
* 969

It is in this way alone, as the learned judge most ably shows, that an uniform measure or standard of adjustment can be obtained, the result of which will be the same whether the markets rise or fall, or whether the charges are increased or diminished. (b)

By the gross produce of the sales is meant the market price at which the merchant, after paying freight, duty, and landing charges, can sell the goods to the consumer or purchaser at the port of arrival. It is plain that a comparison of the full market price, which the consumer would thus give for the damaged goods, with that which he would have given for the same goods if sound, all charges being in both cases previously paid by the seller, affords the exact measure of their depreciation: for it is the deteriorated quality of the goods which, in such case, *alone* determines the difference of price: "the quality of the goods," as Mr. J. Lawrence puts it

Proof that this is the only correct rule of adjustment.

(x) Lewis v. Rucker, 2 Burr. 1167. stone Case," from the nature of the subject insured, which was a cargo of brimstone and shumac. Stevens on Average, 92. 5th ed.
Harry v. Royal Exch. Ass. Comp. 3 Bos. & Pull. 308. Johnson v. Shedden, 2 East, 581. Usber v. Noble, 12 East, 639.

(a) Johnson v. Shedden, 2 East, 581, (b) For detailed proof, see Stevens on Average, 119. 5th ed.
generally known as Lloyd's as the "Brim-

¹ See Lawrence v. N. York Ins. Co. 3 John. Cas. 217; 3 Kent, (5th ed.) 337.

Adjustment of particular average on goods.

Adjustment by comparison of the net proceeds necessarily involves the underwriter in the rise and fall of the markets.

The same freight is payable on goods arriving in bulk, however damaged.

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"can alone influence him in determining what he shall pay." (c)

This mode, then, gives the exact measure of depreciation; it is clear, also, that the comparison of the *net* proceeds would not only fail in this respect, but would also involve the underwriter in the rise and fall of the markets: by the term *net* proceeds is meant the gross proceeds, *deducting freight duty, and landing charges*. Now with regard to freight, the most important of these deductions, it is a fixed principle of our law maritime, that, however much goods may be deteriorated in value by sea damage, yet, *if they arrive in bulk*, the same freight is payable on them as though they had arrived sound. The deduction then to be made from the gross proceeds of the sound and damaged sales in respect of freight would be an *invariable* quantity, however great *the amount of damage might be, and whether the goods came to a losing or a gaining market; but, as Mr. J. Lawrence says in the celebrated judgment already referred to, "if you take equal quantities from two unequal quantities, the smaller such unequal quantities are, the greater will be the difference between their remainders." Now, as the percentage on the prime cost of value in the policy, payable by the underwriter, varies directly with the amount of this difference, it is obvious that any method of adjustment which makes such amount greater or less, according to the rise or fall of the markets, must involve the underwriter in the consequences of such rise and fall. The method of adjustment by comparison of the *net* proceeds of the sound and damaged sales inevitably leads to this result, and therefore, upon the principles already stated, is rejected. (d) Another consequence of

(c) 2 East, 563.

(d) Take the same data as in the two preceding notes, and let the amount of freight payable on the goods be in all cases 100*l*.

Then,

(1) On a losing market.

Gross proceeds of sound sales £350

Deduct freight and charges - 100

Net proceeds of sound sales £250

Gross proceeds of damaged sales
(half loss) - - - £175

Deduct freight and charges 100

Net proceeds of damaged sales 75

Difference (giving the amount of damage) - - - £175

But 175*l*. is 70 per cent. on 250*l*. (the net proceeds of the sound sales) ∴ the underwriter pays 70 per cent. on 500*l*. the prime cost, i. e. 350*l*.

(2) On a gaining market.

Gross proceeds of sound sales - - - £850

taking the net produce would be, that the underwriter would be made responsible for a loss not arising from the deterioration of the commodity by sea damage, but from having to pay equal freight duties and charges on commodities of unequal value, viz., on the sound and damaged goods.

Adjustment of particular average on goods.

*But, by an adjustment founded on a comparison of the *gross proceeds* of the sound and damaged sales, the extent of the underwriter's liability will be always the same, when the relative amount of depreciation is the same. Thus, let it be assumed that the gross proceeds of goods valued at 500*l.* in the policy, would, if they had come to a losing market in a sound state, have been 350*l.*, and if to a gaining market, 850*l.*; let it be further assumed that the depreciation in both cases is one half their sound value : —

* 971

	In a losing market.	In a gaining market.
Then, gross proceeds of sound sales .	£350	£850
gross proceeds of damaged sales .	175	325
	<hr/>	<hr/>
Difference, giving amount of damage .	£175	£425
	<hr/>	<hr/>

In both these cases, the amount of damage being half the gross proceeds of the sound sales, the underwriter pays half the value in the policy, or 250*l.* in each case, irrespective entirely of all fluctuation in the markets.

As goods sold in bond are sold subject to the duty only, and as the amount of duty to be deducted is not an invariable charge, but varies with the amount of the damage, it is obvious that the adjustment of a particular average loss on damaged goods sold in bond may be made upon a comparison either of the net or gross proceeds, *i. e.* of the amount of the sales, either including or excluding the duty. (e)

Adjustment on goods sold in bond.

When an integral part of the goods insured is totally lost,

Deduct freight and charges	100		But 425 <i>l.</i> is 56½ per cent. on 750 <i>l.</i> (the net proceeds of the sound sales) ∴ the underwriter pays 56½ per cent. on 500 <i>l.</i> (the prime cost,) <i>i. e.</i> 283 <i>l.</i> 6 <i>s.</i> 8 <i>d.</i> That is, for the same amount of damage the underwriter pays 350 <i>l.</i> in a losing, and 283 <i>l.</i> 6 <i>s.</i> 8 <i>d.</i> in a gaining market.
Net proceeds of sound sales	£750		(e) For detailed proof of this, see Stevens on Average, 137–147, 5th ed. Be-necké, Pr. of Indem. 430–434.
Gross proceeds of damaged sales (half loss) - - -	£425		
Deduct freight - - - -	100		
	<hr/>		
Net proceeds of damaged sales	325		
	<hr/>		
Difference (giving the amount of damage) - - - -	£425		
	<hr/>		

Adjustment of particular average on goods.

Adjustment on a total loss of part.

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Adjustment where there is a total loss of part, and also a particular average loss of part.

Adjustment where, of several different articles insured together, each arrives sea-damaged.

Sale of sound and damaged goods together when forming part of same bale or package.

as, *e. g.* where one case or package out of several cases or packages of the same description of goods is burnt, or has all its contents washed clean out of it, or goes in bulk to the bottom of the sea, the underwriters will have to pay the same proportion of the value in the policy, which the goods lost bear to the whole goods of the same description comprised in the valuation; in other words, *the exact amount lost must be paid for at its value in the policy. (*f*)

When such total loss of part, and also a particular average loss, both occur on the same interest, as, for instance, if of twenty hogsheads of sugar ten be totally washed out, and ten damaged by sea water, the most correct practice is to adjust them separately; but this is not absolutely necessary, as, whether they are involved together or separated, the result is precisely the same. (*g*)

But where several articles are insured together in the same policy, and each suffers a particular average loss by sea damage, the loss must be adjusted separately on each, even though the clause "*to pay average on each species as if separately insured*" be not inserted in the policy: for otherwise, the underwriter would be involved in the rise and fall of the markets, except in the very improbable case when the state of the markets at the port of arrival is alike *as to all the articles, i. e.* when all the articles, had they arrived sound, would have realized in the port of arrival exactly the same percentage of profit and loss upon their first cost, or valuation in the policy. (*h*)¹

When out of whole packages or bales of manufactured goods only a few articles or pieces in each arrive sea-damaged, it is a frequent practice to sell the sound and damaged goods together at the same auction: the practice does not appear objectionable; but it must be carefully borne in mind, that in adjusting the average on such a sale the diminished value

(*f*) Stevens on Average, 150. 4th ed. Benecké, Pr. of Indem. 150.

(*g*) Benecké, Pr. of Indem. 439. Stevens on Average, 151, 152, 5th ed. who give the proof.

(*h*) This is most ingeniously and incontestably proved both by Mr. Benecké and

by Mr. Stevens; by the former algebraically, and by the latter arithmetically: the proof, however, in its detail, is too long for insertion here, and the reader is, therefore, referred to Benecké, Pr. of Indem. 441 note ‡, and Stevens on Average, 152-155, 5th ed.

¹ See Ocean Ins. Co. v. Carrington, 3 Conn. 357.

at which the sound part of the package may sell, *owing to the assortment being broken*, is not a loss for which the underwriter is liable: for, as Mr. Stevens observes, "he is accountable only for the actual damage done to the thing *insured, and engages to guarantee the assured against the *direct operation of sea damage*, but not against the consequential results." (i)

Adjustment of particular average on goods.

Underwriter not liable for loss owing to the *assortment* being broken.

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As, however, sales by auction of the damaged goods are resorted to mainly with the view of comparing the sound and damaged values, so as to ascertain the amount of indemnity which the underwriter has to pay; and as the charges of these sales need not have been incurred if the goods had not been insured, they are to be borne by the underwriter, though not a part, nor a direct consequence, of the sea damage; accordingly these extra charges (consisting mainly of brokerage, lot money, commission to the agent of the underwriters, &c.) are added separately to the amount of the loss, after its quantum has been ascertained, and then the whole is apportioned on the underwriters in the usual way. (j)¹ Where, in an action on a policy, the jury had found a verdict for an average loss, the court would not grant a new trial, on the ground that it should have been left to the jury to determine whether these extra charges of the damaged sales should be borne by the underwriter or not; as that point was in the discretion of the arbitrator by whom the amount of the loss was directed to be ascertained. (k)

Extra charges of damaged sales to be added to the loss payable by the underwriter.

Generally speaking, a particular average loss on goods is adjusted at the port of destination, and, in such case, the adjustment ought always to be conducted in the manner above described: if, however, a ship, in the course of her voyage, is obliged to run for a port of distress, to repair, and the cargo being necessarily unloaded for that purpose, it is discovered that the whole, or part of it, is so damaged that it would probably be wholly spoiled if reloaded and sent on, and

Sea damage on goods sold in ship's port of distress adjusted as a salvage loss.

(i) Stevens on Average, 155-158, 5th ed. Benecké, Pr. of Indem. 437, 438. (k) Hudson v. Marjoribanks, 7 Moore, 463. S. C. but not S. P. 1 Bingh. 303.

(j) Stevens on Average, 148-150, 5th ed. Benecké, Pr. of Indem. 436, 437.

¹ Mair v. United Ins. Co. 1 Caines, 54.

Adjustment of particular average on goods.

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Adjustment on goods at an intermediate port.

Adjustment on goods arriving sea damaged above 5 per cent. under the memorandum.

Adjustment where whole of intended cargo not on board at time of loss.

therefore, to prevent further deterioration, it is sold on the spot for the benefit of all concerned, in such case the claim must be adjusted as a *salvage loss* — that is, the underwriter pays the difference between the prime cost, or insured *value of the goods, and the net proceeds of the damaged sales, i. e. their market price after deducting all expenses, including freight, *where any is due.* (l) ¹

If the assured, in order to take the benefit of a favorable market, or for other reasons, chooses to put an end to the risk by voluntarily receiving his goods at any port short of their destination, Mr. Phillips thinks that the loss the goods may have incurred by sea-damage should be adjusted in the usual way. (m)

In treating of the common memorandum, we have already had occasion to consider the mode of computing the degree of loss by sea-damage on memorandum articles, so as to ascertain whether it amounts to 5 per cent. ; it is perhaps hardly necessary to add, that, in order to make the underwriter liable under this clause it is not necessary that the direct loss sustained by the merchant should amount to 5 per cent. *on the prime cost or the sum insured*, but only *on the gross proceeds of the sound sales.* (n)

Generally speaking, as we have seen in case of sea-damage to goods under a valued policy, the valuation is the sole basis of adjustment, i. e. the underwriters are to pay the same percentage on the valuation in the policy, as the rate of depreciation amounts to on the sound sales ; and this is so whenever, at the time of loss, the full cargo was on board to which the valuation was intended to apply : where, however, only a part of the full intended cargo is on board at the time of loss, and such part is totally lost with the ship, the rule of adjustment on *valued* policies is, that the underwriters pay the same proportion of the valuation in the policy, as the goods lost bear to the whole intended cargo ; in *open* policies

(l) Stevens on Average, 81. Appendix ii. 263-265. Benecké, Pr. of Indem. 444. 2 Phillips, Ins. 222. Story's ed. of Abbott on Shipping, 329, note.

(m) 2 Phillips on Ins. 222.

(n) Mr. Phillips seems to doubt this (vol. ii. p. 501) : but it appears to me quite unquestionable, and is followed in English practice.

they pay the proved value of the goods (o); the rule would be the same, *mutatis mutandis*, if such part, after being shipped, arrived sea-damaged.

Adjustment of particular average on goods.

*The following case shows the rule of adjustment on a *continuing* policy:—An insurance was effected for twelve months "on goods" on-board thirty barges plying backwards and forwards between London and Birmingham for 12,000*l.*, "as interest might appear thereafter;" a particular average loss having been sustained by the sinking of one of these barges, full of goods, within the year, it was held that the underwriters were bound to pay that proportion of such loss, as 12,000*l.* bore to the whole value of goods at risk on board all the barges, at the time of loss, and not that proportion which 12,000*l.* might bear to the whole amount carried during the year. (p)

* 975

Adjustment on a continuing policy.

§ 360. While the underwriter on *goods* (as is now the invariable practice) insures only their prime cost at the port of loading, the sole mode of adjustment that can be adopted is that which is founded on a comparison of the gross proceeds of the sound and damaged sales. But although, *as between the assured and the underwriter*, this is an equitable mode of adjustment, it is obvious that it by no means affords a perfect indemnity to the assured *as a mercantile man*. Indeed, as we have already seen, it does not profess to do so; its object being not to put the assured in the same condition as though his goods had come undamaged to a saving market, but solely to place him in the same condition he was in at the beginning of the risk. (q)

Proposed mode of insurance on goods so as to secure for the merchant a complete indemnity against particular average loss.

That which the assured loses by the depreciation of his goods at the port of destination, *is an aliquot part of their market price there*, which market price is made up — 1. of their prime cost; 2. of freight, duty, and landing charges; 3. profit or loss. That which the underwriter pays, *is the same aliquot part of the prime cost alone*; hence it is manifest that all loss incurred by items 2. and 3. must fall on the assured alone.

Hence, it has been suggested by Lord Ellenborough, that

(o) *Richman v. Carstairs*, 5 B. & Ad. 651.

(g) *Stevens on Average*, 96, 5th ed. Benecké, *Pr. of Indem.* 1-23.

(p) *Crowley v. Goben*, 3 B. & Ad. 478.

Adjustment of
particular ave-
rage on goods.

Mode proposed
by Lord Ellen-
borough.

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the assured, who desires a full indemnity, in the case supposed, *should either value his goods in the policy at their expected market price in the port of destination, including freight, &c., and expected profit, or else, "in an open policy, stipulate that, in case of loss, it shall be estimated according to the value" (*i. e.* market price) "of the goods at the port of delivery." (*r*)

An objection has been made to this mode of insurance by Mr. Stevens, on the ground that the assured would thus be paying a premium on the whole amount of freight, duties, and expected profit, in order to insure against the contingent loss of part. (*s*)

The answer to this objection is, that provision may be made for a return of premium, in cases either of total loss, where no freight is payable, or in which the loss on profit does not exceed a certain percentage. (*t*)

System of Mr.
Benecké.

And to this end it has been proposed that the different subjects of insurance should be valued separately in the policy. Thus, supposing a party desirous of insuring goods whose prime cost is 2000*l.*, upon which the freight will be about 300*l.*, the duty and landing charges 100*l.*, expected profit 3000*l.*, then such goods should be insured for 2700*l.*, and the meaning of the parties explained by the following clause:—"Of these 2700*l.*, 2000*l.* are on the goods, 300*l.* on the freight, 100*l.* on the duties and landing charges, and 300*l.* on the expected profits at the port of destination." (*u*)

In an open policy the intention of the parties may be thus expressed:—"Valued at so much as the gross proceeds of the goods will amount to at the port of discharge." (*v*)

This mode of insuring goods seems well deserving of the attention of the merchant who wishes to obtain full indemnity in cases of particular average loss. (*w*)

977 *

One principal reason why the merchant fails to receive a complete indemnity from the usual mode of adjustment is, *because, as we have seen, the freight he has to pay on his goods, if they arrive in bulk, is exactly the same, however great may be their depreciation in value.

(*r*) *Usher v. Noble*, 12 East, 639.

(*s*) *Stevens on Average* 129, 5th ed.

(*t*) *Benecké, Pr. of Indem.* 9.

(*u*) *Ibid.* 25-29.

(*v*) *Ibid.* 7 and 8.

(*w*) See the whole subject illustrated

by a series of very ingenious calculations in *Benecké, Pr. of Indem.* 37-43. Mr. Chancellor Kent approves of the mode thus suggested, as the best method of adjustment. *Comm. vol. iii. p. 336, ed. 1844.*

Thus, if goods arrive at a saving port (that is, one where their gross proceeds are sufficient to cover their prime cost + all expenses) damaged *one half* in value, but undiminished in bulk, then the merchant has to pay the shipowner *full freight*, the underwriter pays the merchant *half the prime cost*, and the goods actually sell for an amount equal to half the prime cost and half the freight; the merchant, therefore, receives the whole of the prime cost, but only half the freight; he loses consequently to the extent of the other half, which he has been obliged to pay.

Adjustment of particular average on goods.

By making the amount of freight vary as the amount damage.

Now if half the goods, instead of being *damaged*, had been *wholly destroyed*, so that they had never arrived in bulk at all, the merchant would have had to pay no freight on the half so lost, and his indemnity would have been complete.

And, in the same way, if the freight were in every case diminished in exact proportion to the diminished value of the goods, i. e. if it were an *ad valorem*, instead of a fixed, charge, the indemnity of the merchant, as far as concerns freight, would, in every case, be complete.

Hence, it has been proposed that the shipowner should, whenever goods arrive sea-damaged, thus diminish his claim against the merchant for freight, and protect himself against the loss thus arising from reduction in the *quality* of the goods, just as he now does from loss by reduction in their *quantity*, viz. by demanding the freight thus lost from the underwriter on freight. (x)

This would, undoubtedly, be an equitable arrangement, but the mode of insuring on the expected gross proceeds appears to be both easier in its practical application, and also to provide a more complete indemnity in every conceivable case of loss.

*ART. 2. *Adjustment of Particular Average loss on Ship.*

* 978

§ 361. Having seen elsewhere for what partial losses and disbursements the underwriter on ship is liable under the policy, it remains now only to consider in what mode such losses are adjusted.

Adjustment of particular average on ship.

(x) Stevens on Average, 131, 5th ed. calculation illustrating the anomalous operation of the present rule.
M'Culloch's Comm. Dict. Art. Marine
Ins. p. 699, ed 1837, where there is a

Adjustment of particular average on ship.

Basis of adjustment on ship same as on goods.

The sole basis on which all particular average losses on the ship are adjusted is, as in the case of goods, under *valued* policies, the value in the policy, unless manifestly fraudulent, or grossly excessive (y) : and under *open* policies it is, in all cases the value of the ship at the outset of the risk, i. e. *what she is worth to her owner at the port where the voyage commences, including all her stores, outfit, and money advanced for seamen's wages, the whole covered with the premium and costs of the insurance.* (z)

Where a ship is valued at different sums in two different policies, we have seen that the assured on one policy is not limited as to the amount which he may recover in cases of total loss by the valuation in the other (a) ; and the same rule has been adopted in the United States with regard to the adjustment of a particular average loss on ship. (b)

Rule of adjustment.

The rule, therefore, for adjusting a particular average loss on the ship, is very simple, viz. that in *open* policies, the underwriter pays the same aliquot part of the sum he has agreed to insure, as the damage, or the expense of repairing it, is of the ship's value at the commencement of the risk ; in *valued* policies he pays the same proportion of the valuation in the policy. (c) Thus, suppose in an open policy an underwriter has insured 1000*l.* on a ship, the insurable worth of *which is proved to have been 200*l.* at the outset of the risk, but whose value is reduced by the wear and tear of the voyage, &c., to only 1500*l.* at the time of loss, then if a particular average loss takes place amounting to 500*l.*, as that sum is one fourth of 2000*l.*, the ship's insurable value at the outset, the underwriter pays the same proportionable amount, or one fourth of 1000*l.* the sum he has insured, viz. 250*l.* (d)

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The principal difficulty, therefore, in adjusting a particular average loss on ship, consists not in the rule of apportionment, but in ascertaining and fixing the amount of damage.

(y) *Shaw v. Felton*, 2 East, 109. Haigh v. De la Cour, 3 Campb. 319.

(z) *Stevens on Average*, 190, 5th ed. *Benecké, Pr. of Indem.* 133. 2 *Phillips on Ins.* 207.

(a) *Bousfield v. Barnes*, 4 Campb. 228. *Aliter*, where the valuation in both policies is the same. *Irving v. Richardson*, 1 M. & Rob. 153.

(b) † *Murray v. Ins. Comp. of Pennsylvania*, 2 Wash. C. C. Rep. 186.

(c) *Benecké, Pr. of Indem.* 460. 2 *Phillips on Ins.* 207.

(d) This shows the policy of insuring ships, as nearly as may be, to their full value, for the purposes of indemnity.

If the damage done to the ship has not been repaired, the only mode of ascertaining its amount is by the estimate of surveyors. Where, however, the damage has been repaired, the established mode of estimating its amount is to deduct *one third from the whole expense both of labor and materials which the repairs have cost, and to assess the damage at the remaining two thirds.* This is termed deducting *one third new for old*, and it is done on the principle that, *unless where the ship is quite new*, the substitution of new for old materials is a benefit to the shipowner, who gets the ship the better for the repairs by the substitution of new work for old, and would consequently be a gainer if the whole expense of labor and repairs were regarded as so much pure loss to him: to avoid discussion in each particular case, the amount of deduction is fixed at one third. (e)

Adjustment of particular average on ship.
Rule of deducting one third new for old.

It is obvious, that if the ship be *quite new*, the reason for the rule would fail, and the rule itself consequently would not apply: accordingly, if it can be shown that this is the case, the deduction of one third new for old will not be made. (f)

Limitations on the rule as to deducting one third new for old.

The question is, when the ship is so far to be regarded as * a new ship, that the deduction shall not be made: in this country the general rule is that a ship is to be so regarded only while she is on her *first voyage*; but when she shall be considered to be on her *first voyage*, is in itself a question that has given rise to much controversy, and can hardly yet, perhaps, be considered as settled, as the following cases will show. A ship, which had never been at sea before, was insured on a voyage "from Bristol to New York, during her stay there, and back to the port of discharge;" the charter-party stipulated that the ship, after sailing outwards, was "to return to London, Liverpool, or Bristol, &c., and so end her intended voyage." The ship arrived at New York in safety, but on her passage homeward from New York to Liverpool got upon a shoal, and was obliged to be repaired: the assured on ship having claimed a particular average loss for these repairs, the

1. The deduction is not made where the ship is on her *first voyage*. What is the ship's *first voyage*.

* 980

Fenwick v. Robinson, 3 Car. & P. 323; Dana, & Ll. 8.

(e) *Da Costa v. Newenham*, 2 T. Rep. & P. 324. Stevens on Average, 172. 5th ed. 407. *Poingdestre v. Royal Exch. Ass.* ed. Bencké, Pr. of Indem. 457. 2 Comp. Ryan & Moody, 378. Per Lord Phillips, 198. *Tentorden in Fenwick v. Robinson*, 3 C. (f) Stevens on Average, 172. 5th ed.

Adjustment of
particular average
on ship.

sole question at the trial was whether the ship, having been quite new when she sailed from Bristol, was on her first voyage or on her second when the loss took place, so as to be within the rule for deducting one third new for old : in other words, the question was, *whether the passage back from New York to England was, under the circumstances, to be considered as a second voyage or only as part of the first.*

The evidence of the brokers and underwriters as to this point was extremely contradictory : those called as witnesses for the *plaintiff* said that the passage *out* from England to New York, and *home* from New York to England made only one voyage : of those called for the *defendant*, on the other hand, some said that a vessel had made her first voyage whenever she had earned or put herself in a condition to earn freight ; others that a passage from port to port was a first voyage within the meaning of the rule ; and all seemed to agree that neither the policy nor the charter-party were, in practice, a criterion for determining the point.

Lord Tenterden told the jury, that the charter-party and policy might be taken into consideration.

In this state of the evidence, Lord Tenterden suggested to the jury that the charter-party and policy might fairly be taken into consideration for the sake of ascertaining whether the voyage out and home was all one adventure, as, upon the face of those instruments, his lordship said, it appeared to *be : the jury found for the plaintiff, saying that they considered it as all one voyage. (g)

981 *

Pirie v. Steele,
2 M. & Rob.
49 ; 8 C. & P.
200.

In the next case, a new ship was chartered for a voyage from London to Port Jackson and Van Diemen's Land with convicts, freight to be paid on her arrival there ; and by the *ship's articles* it appeared that she was bound on a voyage from England to Van Diemen's Land Australia, or any other (*sic*) port in India, till her arrival in England. The ship completed her outward voyage, but being unable to procure homeward freight from Van Diemen's Land, she went in ballast to Madras, and there took in freight for England, as was proved to be customary for ships so chartered. In the homeward passage from Madras to England she sustained the injury for which the present action was brought, on a time policy for a year, effected after she left

Van Diemen's Land, and under which she was sailing at the time of loss: the question was, whether, at the time of loss, she was on her first voyage.

Adjustment of particular average on ship.

The evidence, as in the former action, was very contradictory; the witnesses for the plaintiff stating that a voyage means the voyage out and home, whether long or short: that the voyage out is only a *passage*, and it is not a voyage till the ship comes back. The witnesses for the defendant, though they disagreed in other points, all seemed to coincide in this, that on the *earning of freight* the first voyage was at an end. The jury, however, without hearing counsel in reply, expressed themselves satisfied that the rule allowing a deduction of one third did not apply under the circumstances, and found for the plaintiff, *i. e.* they held that the ship, at the time of the loss, was to be regarded as on her *first voyage*. (*h*)

Lord Abinger, before whom the case was tried, said that he could not subscribe to the doctrine of the policy determining the point. (*i*)

Lord Abinger held, that the policy could not determine the point, and that the most sensible rule was, not to deduct thirds until the ship was of a certain age.
* 982

*On its being stated, in this case, that the Marine Insurance Society deduct no thirds *unless the ship is eighteen months old*, Lord Abinger said, That is a very sensible rule, and much more certain than the rule of the first voyage, which may be either very long or very short. (*j*)

In a case tried before Mr. J. Bayley, on the northern circuit, where a policy was effected in *Dublin* for a voyage from the Humber to the Baltic and back, and where a practice was relied upon by the assured, as prevailing on the Humber, that all ships were to be considered new ships, so as to exclude the underwriter from the deduction, if they had been *only built twelve months*, his lordship held, that the policy, being an Irish one, the practice on the Humber could not be set up to counteract the general rule. (*k*)

Thompson v. Hunter, 2 M. Rob. 5.

These decisions are not satisfactory; nor is it, perhaps, possible to derive from them any general rule; though, upon the whole, the weight of authority seems in favor of the

Remarks on these decisions.

(*h*) Pirie v. Steele, 2 Mood. & Rob. 49. S. C. (more fully reported,) 8 C. & P. 209.

(*i*) 8 C. & P. 204.

(*j*) 8 C. & P. 202.

(*k*) Thompson v. Hunter, cited 2 Mood.

& Rob. 51, where it is stated that "the plaintiff recovered the full amount of his loss," which must clearly be erroneous, and must mean "the amount minus deduction of one third new for old."

Adjustment of particular average on ship.

Suggested rule.

Where loss is chiefly on new materials of an old ship.

983 *

Poingdestre v. Royal Exch. Ass. Comp. Ry. & Mood. 378.

Where ship, by default of the underwriters, never comes to the hands of the owner.

Da Costa v. Newenham, 2 T. Rep. 407.

position that, except under very special circumstances, a new ship is to be considered on her first voyage, so as to exclude the underwriter from deducting thirds, if the loss takes place at any part of an integral voyage out and home, whether on the outward or homeward passage, the entirety of the voyage to be determined from all the facts of the case, and not from the charter-party or policy alone: in fact, as it was put by Sir Frederick Pollock, in the course of his argument in *Pirie v. Steele*, *the first voyage lasts from the first time that a ship leaves her port till she comes back to it again, if she leaves it cum animo revertendi.* (l) ¹

If an old ship have been newly repaired just before sailing on the voyage on which the loss takes place, and the loss falls **exclusively* on the new materials, the same rule of exclusion of thirds would seem to apply (m); but this is a case which can rarely, if ever, occur; and it has been decided that if the damage only fall *chiefly* on the repaired part, there is nothing to exclude the underwriter from his right of deducting thirds. (n)

If the ship, after being repaired, never comes into the hands of the owner again, the reason for the rule obviously fails, as in such case it is clear that he can never derive any benefit from the superior value of the new over the old materials.

Thus, where the assured was prevented from regaining possession of his ship by the *fault of the underwriters*, in refusing to pay a bottomry bond for repairs incurred by their direction and at their expense, by reason of which the ship was sold to satisfy the bond, &c., it was held that they were not entitled to deduct their thirds, "Here," said Mr. J. Ashurst, "as the plaintiff never has been put into free possession again of his ship, and that through the default of the

(l) 8 Carr. & P. 201.

(m) See Stevens on Average, 172.

(n) Poingdestre v. Royal Exch. Ass. Comp. Ry. & Mood. 378.

¹ But in the United States the English rule, distinguishing between new and old vessels, has not been adopted, and here the deduction of one third new for old has been made, whether the vessel be new or old; on her first or any subsequent voyage. 3 Kent, (5th ed.) 339, and note; *Dunham v. Com. Ins. Co.* 11 John. 315; *Sewall v. U. S. Ins. Co.* 11 Pick. 90; *Orrok v. Commonwealth Ins. Co.* 21 Pick. 456, 468; *Nichols v. Maine Fire & Mar. Ins. Co.* 11 Mass. 253.

underwriters, he cannot be said to have any benefit from the repairs, and is not, therefore, bound to make this allowance." (o)

Adjustment of particular average on ship.

But where the failure to regain possession of the ship arises from the default of the assured himself, the case has been held, in the United States, not to come within the exception. Thus, where the owners of a ship, bottomried for the expense of repairs incurred on their account, permitted her, after her return to the home port, to be sold under judicial process on the bottomry bond, owing to their neglect to discharge such bond, it was held by Mr. J. Story that the underwriters were entitled to the deduction of one third new for old, they having done no act to prevent the free possession of the ship by the owner. (p)

Admir where this arises from the fault of the shipowner.

It is not, however, every part of the ship's furniture and *apparel in respect of which thirds are to be deducted : thus, although the cost of repairing ironwork generally is subject to this deduction,¹ yet that of replacing anchors is not, as anchors are considered not to lose in value by being used. (q) The deduction from chain cables is now fixed at one sixth. (r) With regard to copper sheathing there seems no generally established practice ; Mr. Benecké and Mr. Stevens both mention with approbation a rule of one of the insurance associations, by which no deduction on copper sheathing is made in the first year, one fifth in the second year, and so on, deducting one fifth more for every succeeding year, till the completion of the five years ; after which no part of the copper is made good. (s)

No thirds deducted for anchors.

* 984

Chain cables.

Copper sheathing.

In this country painting is allowed in the average when the damage happens on the outward voyage, and the ship was newly painted before sailing. (t)

As the old materials thrown aside in making the repairs are always of some, and occasionally of considerable, value, From what the one third is deducted.

(o) *Da Costa v. Newenham*, 2 T. Rep. 407.

(r) *Stevens on Average*, 173, 5th ed.

(s) *Stevens on Average*, 173, note (1).

(p) † *Humphrey v. Union Ins. Comp.*

Benecké, Pr. of Indem. 458.

3 *Mason's Rep.* 429.

(t) *Stevens, ibid.*

(g) *Benecké, Pr. of Indem.* 458.

¹ The deduction is to be made in the case of a new iron strap for a dead eye. *Brooks v. Oriental Ins. Co.* 7 Pick. 259.

Adjustment of particular average on ship.

1. From the balance that remains after deducting the value of the old materials from the gross expense of the repairs.

2. From the expense of both labor and materials.

985 *

3. Are incidental expenses added to the amount from which the deduction is made. Marine interest.

it is important to ascertain whether the proceeds of such old materials are to be deducted from the gross expense of the repairs *before* or *after* deducting the one third new for old. It has been decided in the United States, that the *true rule is to apply the old materials towards payment of the new, as far as they will go, and then to deduct the third from the balance.* (u) ¹ And this seems the correct rule; for, as Mr. Phillips observes, "as far as the proceeds of the old materials will go, the damaged article may be said to repair itself; that which is strictly the loss—the ground of claim—is the excess of the expense of the repairs beyond this point," and, accordingly, the deduction should be made from this latter amount. (v) The third is deducted not from the expense of the materials alone, but from that of the labor and materials conjointly. (w) ²

*In America, incidental expenses, such as dockage and wharfage, are added to the sum from which the deduction is made. (x)

So, where part of the expense of repairs consisted of the marine interest on a bottomry bond, it was held in Supreme Court of Massachusetts, that this was as subject to the deduction of one third, as the rest of the expenses, and, therefore, must be added to the sum from which the deduction is made. (y)

(u) † Byrnes v. National Ins. Comp. 1 Cowen, 265. † American Ins. Comp. v. Center, 4 Wendell, 5.

(v) 2 Phillips Ins. 203, 204.

(w) Benecké, Pr. of Indem. 458.

(x) 2 Phillips, Ins. 201.

(y) † Orrok v. Commonwealth Ins. Comp. 21 Pick. 456. "In case of a partial loss, where money is taken up on

bottomry, the underwriters have nothing to do with the bottomry bond, but are simply bound to pay the partial loss, including their share of the extra expenses of obtaining the money in that mode as a part of the loss." (Per Mr. J. Story in † Bradlie v. Maryland Ins. Comp. 12 Peters, (S. C.) 405, 406.)

¹ Brooks v. Oriental Ins. Co. 7 Pick. 259; Eager v. Atlas Ins. Co. 14 Pick. 441; Dickey v. New York Ins. Co. 4 Cowen, 222; 3 Kent, (5th ed.) 339. See Giles v. Eagle Ins. Co. 2 Metcalf, 144, 145; Wallace v. Ohio Ins. Co. 4 Ohio, 294; Perry v. Ohio Ins. Co. 5 Ohio, 306.

² The customary deduction of one third new for old, is applicable only to the labor and materials employed in the repairs, and to the new articles purchased in lieu of those which are lost or destroyed; and it does not apply to other incidental expenses, having no connection with the repairs or new articles furnished, and from which the assured can possibly derive no enhanced benefit or value beyond his loss; such as steamboat towage, boat hire, &c. Potter v. Ocean Ins. Co. 3 Sumner, 27, 45. It does not apply to the expense of getting afloat a submerged or stranded ship. Sewall v. U. States Ins. Co. 11 Pick. 90.

Where repairs are necessarily done to a ship in a port of distress, and, as will frequently be the case, cost more there than if done in the home port, it has been made a question at what rate they should be paid for by the underwriters on ship, at that of the port of distress,—or the home port (*z*): the former appears unquestionably to be the true rule of adjustment, as the necessity of repairing the ship in the port of distress, which occasioned the increased expense, was an immediate consequence of one of the perils insured against; accordingly this is the rule adopted in practice in all cases of necessary repairs at a foreign port, the underwriter being of course entitled to deduct his thirds. (*a*)

Adjustment of particular average on ship.

Extra cost of repairs at port of distress is a charge on the underwriter.

In one case in the United States where full repairs might have been made abroad, but at an expense much greater than they would have cost at home, and the master chose to pursue his voyage with *temporary* repairs merely, the cost of such temporary repairs, and also of the subsequent permanent repair rendered necessary after the ship's arrival in her home port, were both included in the particular average. (*b*) Even though the underwriters refuse their assent to the repairs being done in a particular way, yet the assured may, it seems, *proceed to such repairs, and, if necessary, and done properly, the underwriters will be liable. (*c*)

Where temporary repairs only are made at the foreign port.

* 986

Where goods are necessarily sold in a port of distress to defray the cost of repairing the ship, the well-established rule is, that if the ship afterwards reach her port of destination, the merchant will be entitled to receive from the shipowner the clear value for which the goods might have been sold at the latter port on arrival. (*d*)

Cost of replacing goods sold for repair of ship, is average.

It has also been decided in this country that if the goods sell for more in the *port of distress* than they would have realized in the *port of destination*, the merchant is entitled to benefit by the difference, and to receive from the shipowner the higher price. (*e*)

In adjusting a particular average loss on ship arising from

(*) Magens, vol. i. p. 54. and case xx. p. 255.

(e) † Walker v. Louisiana Ins. Comp. 9 Martin's Rep. N. S. 276.

(a) Bencké, Pr. of Indem. 450-461. < Center v. Amer. Ins. Co. 7 Cowen, 564. >

(d) Alera v. Tobin, Abbott on Shipping, 327. 6th ed. < 6th Am. ed. 372, > and the law there laid down.

(b) † Brooks v. Oriental Ins. Comp. 7 Pick. 150.

(c) Richardson v. Nourse, 3 B. & Ald. 237.

Adjustment of particular average on ship.

the expense of repairs thus defrayed by a sale of goods in a port of distress, the practice in the United States is to deduct thirds both from the cost of the repairs, and also from the difference between what the goods sold for in the port of distress, and that which they would have sold for in the port of destination. (*f*)

Expense of repairs actually made before total loss, may be recovered cumulatively as average,

but not the estimated cost of repairs not in fact made.

If a ship have been actually repaired in a port of distress, and be afterwards totally lost before arriving at her port of destination, the cost of such repairs may be recovered cumulatively in addition to the total loss, either *quá* average, or as money laid out and expended in laboring for the safeguard and recovery of the ship under the general printed clause in the policy (*g*): but this rule only applies to repairs *actually made*; hence where a ship put back twice in distress, and, on the *first* occasion was actually *re-coppered*, but on the *second* occasion was only surveyed, but not repaired, and in the course of the survey some of her *wales*, &c. were necessarily removed, in order to examine her timbers, and *never* **replaced*, but sold, with the rest of the ship, as wreck, it was held that the cost of the *re-coppering* might be recovered in addition to a total loss, but *not the estimated expense of replacing the wales* (*h*): where no repairs have been made, no previous partial loss by sea damage can be recovered from the underwriter, as a particular average, in addition to a subsequent total loss. (*i*)

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ART. 3. *Adjustment of Partial Loss on Freight, Profits, &c.*

Adjustment of partial loss on freight, profits, &c.

Rule of adjustment as to freight.

§ 362. The rule for adjusting a partial loss on freight is very simple, viz. that, where the sum insured, or the valuation in the policy, is less than the value of the interest at risk, the underwriter pays the same proportional part of the loss, that the sum insured, or the valuation in the policy, is of the value of the freight: if the sum insured, or the valuation in the policy equals the value of the interest, then he pays the whole of the loss. (*j*)

(*f*) † *Depau v. Ocean Ins. Comp.* 5 Cowen's Rep. 63.

(*g*) *Le Cheminant v. Pearson*, 4 Taunt. 367. { *See Jumel v. Marine Ins. Co.* 7 John. 412. }

(*h*) *Stewart v. Steele*, 5 Scott's N. R. 927.

(*i*) *Livie v. Jansen*, 12 East, 648.

(*j*) 2 *Phillips on Ins.* 213.

Freight is generally insured in valued policies, and when this is so, the valuation in the policy is the sole basis, on which to calculate the amount of indemnity the underwriter has to pay, except in the case where only part of the *full cargo* to which the valuation was intended to apply is on board, or contracted for at the time of loss: in such cases, as we have already seen, the underwriter can only be called on to pay upon such proportion of the value in the policy, as the part of the cargo on board or contracted for at the time of loss bears to the full intended cargo. (*k*)

Adjustment of partial loss on freight, profits, &c.

Rule where only part of full intended cargo is shipped, or contracted for at time of loss.

In *open* policies on freight the loss by the general usage of Lloyd's is adjusted upon the *gross*, and not upon the net, proceeds of the freight at the port of destination; and this usage, though considered inconsistent with sound principle, has been sanctioned and acted upon by the Court of Common *Pleas (*l*): if, in an open policy on freight, only part of the cargo be on board or contracted for at the time of loss, and this part be totally lost, the underwriters can only be called upon to pay the actual amount of freight on the goods actually lost, together with premiums and costs of insurance (*m*): in fact, in such cases the underwriters, whether in a valued or open policy, shall adjust *as for a total loss of part of the freight*: paying the same proportion of the sums for which they have subscribed the policy, as the freight of the goods lost bears to the full freight, which would have been earned, had the whole intended cargo been loaded, and all arrived.

Rule of adjustment in *open* policies.

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Where only part of full intended cargo board.

Where only freight *pro rata* is earned, this is adjusted in the United States as a salvage loss, i. e. the underwriter pays the difference between the *pro rata* and the full freight. (*n*)

Freight *pro rata*.

Where, as is frequently the case in the United States, it is agreed to adjust an average loss on profits at the same rate as on the goods out of which they are to arise, and the goods arrive sea-damaged, or part of them is totally lost, this is adjusted as an average loss on profits *pro tanto* (*o*); and the rule there is the same, where part of the goods, owing to the

Adjustment on profits where part of goods lost.

(*k*) *Forbes v. Aspinall*, 13 East, 323.

See *supra*, Part I. Chap. xi. on Valuation.

(*l*) *Palmer v. Blackburne*, 1 Bingh. 62.

(*m*) *Forbes v. Cowie*, 1 Campb. 520.

Per Lord Ellenborough in 13 East, 326.

(*n*) 2 Phillips on Ins. 208-210.

(*o*) *Ibid.* 226, 227.

Adjustment of
partial loss on
freight, profits,
&c.

decay produced by sea-damage, are necessarily sold, or thrown overboard in the course of the voyage. (p)

SECT. IV. *Petty Averages.*

Petty averages.

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§ 363. In discussing the subject of general average, it has appeared that *all extraordinary charges*, occasioned by unforeseen and unusual accidents, and incurred for the general benefit, were the subjects of general contribution: there are, however, many charges similar in kind, though different in occasion and object, which occur regularly in the usual course of the voyage, and which the master, in the ordinary *course of his duty, necessarily furnishes for the purposes of the ship and cargo. These charges are called *petty averages*. They are never the subject of any claim on the underwriter; but were formerly, and, in some cases still are, borne, *one third by the ship, and two thirds by the cargo*; generally speaking, in modern practice it has become usual to compound for these petty averages by paying 5 per cent. calculated on the freight, and 5 per cent. more for primage charged on the captain; and accordingly, bills of lading in use at present contain a provision for the payment of primage and average accustomed. (q)

These charges are all the ordinary charges at the places of loading and unloading, and during the voyage; such as *common pilotage*, tonnage, light money, beaconage, anchorage, *ordinary* quarantine, river charges, signals, instructions, passage money by fortified places, expenses for digging a ship out of the ice when frozen up in the regular course of the voyage. &c. (r)

Of course, if any of these charges be incurred for any *extraordinary* purpose, to relieve the ship and cargo from impending danger, they will, as we have seen, be general average.

(p) Ibid. 226, 227.

Benecké, Pr. of Indem. 165. Stevens on

(q) Park on Ins. 217. 8th ed. Marsh. Average, 3. 5th ed.

Ins. 540. 2 Phillips on Ins. 71. note. (r) Ibid. *quod supra*.

GENERAL DOCTRINE OF TOTAL LOSS AND ABANDONMENT.

§ 364. A *total loss*, in insurance law, is one on account of which the assured is entitled to recover from the underwriter the whole amount of his subscription.

General doctrine of total loss and abandonment.

Total losses are either absolute or constructive. An *absolute total loss* is one which entitles the assured to claim from the underwriter the whole amount of his subscription, *without giving notice of abandonment*.

Total loss — what.

A *constructive total loss* is one which entitles him to make such claim, on condition of giving such notice.

An *absolute total loss* takes place when the subject insured wholly perishes, or its recovery is rendered irretrievably hopeless. (a) ¹

Absolute total loss.

A *constructive total loss* takes place when the subject insured is not wholly destroyed, but its destruction is rendered highly probable, and its recovery, though not utterly hopeless, yet exceedingly doubtful. ²

Constructive total loss.

The distinction between cases of absolute and constructive total loss has nowhere been better pointed out than in the following passage, from the judgment of Lord Abinger, in the leading case of *Roux v. Salvador*.

Doctrine of absolute and constructive total loss, and of abandonment, as stated by Lord Abinger.

"The underwriter," says his lordship, "engages that the subject of insurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position that

Cases of absolute total loss.

(a) La perte réelle est l'anéantissement survenant. Boulay-Paty on Emerigon, vol. ii. p. 217. ed. 1827.

¹ *Post*, p. 1000.

² *Post*, p. 1032.

General doctrine of total loss and abandonment.

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Cases of constructive total loss.

it is wholly out of the power of the assured, or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured."

*" But there are intermediate cases ; there may be a capture which, though *prima facie* a total loss, may be followed by a re-capture, which would re-vest the property in the assured. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the *ship* innavigable, without any hope of repair, or by which the *goods* are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination."

Abandonment.

"In all these, or any similar cases, if a prudent man, not insured, would decline any further expense in prosecuting an adventure, *the termination of which will probably never be successfully accomplished*, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of a total loss, and demand the full sum insured. But if he elects to do this, as the thing insured, or a portion of it, still exists, and is vested in him, the very principle of indemnity requires that he should make *a cession of all his right to the recovery of it*, and that, too, within a reasonable time after he receives the intelligence of the accident, that the underwriter *may be entitled to all the benefit of what may still be of any value*, and that he may, if he pleases, take measures, at his own cost, for realizing or increasing that value. In all these cases, not only the thing insured, or part of it, is supposed to exist in specie, but there is a possibility, however remote, of its arriving at its port of destination, or, at least, of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it."

Consequences of not abandoning — where the loss turns out to be only partial.

Where it turns out to be, in fact, total.

"If the assured prefers the chance of any advantage that may result to him beyond the value of the thing insured, he is at liberty to do so ; but then *he must also abide the risk of the arrival of the thing in such a state, as to entitle him to no more than a partial loss*. If, in the event, the loss should become absolute, the underwriter is not the less liable upon

his contract, because the assured has used his own exertions *to preserve the thing insured, or has postponed his claim, till that event of a total loss has become certain, which was uncertain before." (b)

General doctrine of total loss and abandonment.

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Abandonment defined.

Abandonment, therefore, is the act of cession, by which, in cases where the loss or destruction of the property, though not absolute, is highly imminent, the assured, on condition of receiving at once the whole amount of the insurance, relinquishes to the underwriters all his property and interest in the thing insured, as far as it is covered by the policy, with all the claims that may ensue from its ownership, and all the profits that may arise from its recovery. (c)

No formal deed or instrument is required in order to carry this act into effect. (d) Immediately upon receiving intelligence of such a loss as, in his opinion, entitles him to abandon, the assured in this country sends to the underwriters an intimation, generally in writing (e), that he abandons, or intends to abandon, to them all his interest in the subject insured, and to look to them for payment of a total loss. This intimation is technically called a *notice of abandonment*, and it is the only form required by the law for carrying an abandonment into effect. (f)

No formal instrument of abandonment required. Notice of abandonment.

If the underwriter, on receiving this notice, either *expressly*, by word or writing, or *impliedly*, by his acts, shows that he is willing to adopt the abandonment on the terms proposed by the assured, he is said, in technical language, "*to accept the notice of abandonment.*" (g)

Acceptance of abandonment.

If the intelligence upon which the notice of abandonment was founded turns out to be *wholly false*, then, of course, such notice is a mere nullity, and the underwriter is

Unless the intelligence is false, the acceptance binds the underwriter.

(b) Per Lord Abinger in *Roux v. Salvador*, 3 Bingh. N. C. 286, 287.

"*Le délaissement équivaut à un transport.*" See *post*, 1157.

(c) Emerigon thus defines it: L'acte par lequel l'assuré quitte et délaisse aux assureurs, les droits, noms, raisons, et actions qu'il a en la chose assurée, chap. xvii. vol. ii. p. 206. ed. 1827. The earliest and best exposition of the true nature of abandonment is to be found in *Le Guidon*, chap. vii. art. 1; and see the note thereon in *Pardessus*, *Collection des Lois Maritimes*, vol. ii. p. 400. The sum of the whole is conveyed in the sentence,

(d) *Guidon*, chap. vii. art. 3.

(e) It need not even be in writing, but may be made orally. *Parmeter v. Todhunter*, 1 Campb. 542. *Read v. Bonham*, 3 Brod. & Bingh. 147.

(f) See *post*, Chap. IX. Sect. 2. "Form of Notice of Abandonment." *Post*, 1161.

(g) See *post*, Chap. IX. Sect. 4. "Acceptance of Abandonment." *Post*, 1172.

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The facts upon which the abandonment is made must be such as to justify it at the time.

Subsequent restoration of the property defeats the right to insist on a notice of abandonment in England.

*not bound by his acceptance. (h)¹ In every other case however, a notice of abandonment *once accepted by the underwriter* cannot be disputed by him, and he is bound to pay the assured the whole amount of his subscription, without any reference whatever to the subsequent restoration of the property. (i)

Except in cases where the underwriter, by accepting or acting upon it, has thus precluded himself from taking any objection to its validity, it may be laid down as an universal principle, that no abandonment can have any effectual operation unless the state of things was such as to justify it at the time it was made.

Hence, by the phrase a "*valid abandonment*" is meant one warranted by the state of things existing when notice of abandonment was given. (j)

Up to this point there is an entire agreement between our own law and that of other maritime states with regard to abandonment: we have now, however, arrived at that which constitutes the most important distinction between the doctrine of abandonment, as understood in this country, and that which prevails on the greater part of the continent of Europe

(h) Emerigon, chap. xvii. sect. vi. vol. ii. p. 233. ed. 1827. See also per Lord, *Ellenborough in Bainbridge v. Neilson*, 10 East, 341.

(i) See *post*, Chap. IX. Sect. 4. "Acceptance of Abandonment." *Post*, 1172.

(j) In England see *Bainbridge v. Neilson*, 10 East, 329, and 341. In France, *Pardessus, Cours de Droit, Comma. part iv. tit. v. chap. iii. § 1. tom. 3. p. 233. ed. 1841.* In the United States, 2 *Phillips on Ins.* 373. and the cases there cited. { *Marshall v. Delaware Ins. Co.* 4 *Cranch*, 202; 2 *Wash. C. C.* 54; *Church v. Bident*, 1 *Caines, Cas.* 21; *Hallett v. Peyton*, 1 *Caines, Cas.* 28; *Penny v. N. York Ins. Co.* 3 *Caines*, 155; *Schieffelin v. N.*

York Ins. Co. 9 *John*, 26; *Dickey v. N. York Ins. Co.* 4 *Cowen*, 222; *Dickey v. Amer. Ins. Co.* 3 *Wendell*, 658; *Church v. Mar. Ins. Co.* 1 *Mason*, 241; *Humphrey v. Union Ins. Co.* 3 *Mason*, 429; *Depau v. Ocean Ins. Co.* 5 *Cowen*, 63; *Dutilh v. Gatliff*, 4 *Dallas*, 446; *Rhinelander v. Ins. Co. of Pensylv.* 4 *Cranch*, 20; *Lee v. Boardman*, 3 *Mass.* 238; *Wood v. Lincoln and Kennebec Ins. Co.* 6 *Mass.* 479; *Peele v. Merchants Ins. Co.* 3 *Mason*, 27; *Maryland & Phoenix Ins. Co. v. Bathurst*, 5 *Gill & John*, 139; *Bradlie v. Maryland Ins. Co.* 12 *Peters*, 378; *Ralston v. Union Ins. Co.* 4 *Binnely*, 386. }

¹ For cases showing on what intelligence an abandonment may be made. See *Muir v. Ins. Co.* 1 *Caines*, 54; *Boeley v. Chesapeake Ins. Co.* 3 *Gill & John*, 450. On intelligence of the capture of the ship, the insured may wait the event, and abandon on intelligence of condemnation. *Maryland & Phoenix Ins. Co. v. Bathurst*, 5 *Gill & John*, 159. See *Duncan v. Koch, Wallace*, 33.

and in the United States of America — a distinction so completely pervading the whole subject that it cannot be brought too early before the reader's notice.

General doctrine of total loss and abandonment.

The doctrine of all foreign and American jurists is "that, if the facts are such as to justify an abandonment at the time it was made, the subsequent recovery of the property, before the assured has taken legal measures for enforcing his claim, does not divest him of his right to insist on his abandonment, and recover as for a total loss (*k*); or in the language of Mr. J. Story, "an abandonment *once rightfully* made is *conclusive, and the rights following from it are not divested by any subsequent events which may change the situation of the property." (*l*)¹

Not so in France or the United States.

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In our own country the law is different, and the rule (though doubted by Lord Eldon, and by him intended to have been submitted to the twelve judges (*m*),) must now be considered as established, by a long and uniform course of decisions, *that, even although the facts were such as to justify the assured in giving notice of abandonment at the time he did so, yet he cannot insist on such notice, and recover as for a total loss, if the thing insured be restored, before he commences his action, in such a state that he may reasonably be expected to take possession of it.* (*n*)

In fact, in English law, to use the words of Lord Ellenborough, "the nature of the damnification at the time when

In this country the nature of the damnification at the time when the action is brought is the criterion of the right to recover as for a total loss.

(*k*) 3 Kent's Comm. (5th ed.) p. 325. For the rule as it prevails on the continent, see Emerigon, chap. xvii. sect. 4. vol. ii. p. 222. ed. 1827. Boulay-Paty, *ibid.* 223. Code de Commerce, Art. 365. Pardessus, Cours de Droit, Com. vol. iii. part iv. tit. v. ch. 3. and 4. p. 423. ed. 1841. For the rule as established in the United States, see † Marshall v. Delaware Ins. Comp. 4 Cranch, (S. C.) Rep. 202.

(*l*) † In *Peele v. Merchant's Ins. Co.* 3 Mason's Rep. 27.

(*m*) In *Smith v. Robertson*, 2 Dow's Parl. Cases, 474.

(*n*) *Bainbridge v. Neilson*, 10 East, 329. *Patterson v. Ritchie*, 4 M. & Sel. 393. *Brotherton v. Barber*, 5 M. & Sel. 418. *Naylor v. Taylor*, 9 B. & Cr. 725; *Holdsworth v. Wise*, 7 B. & Cr. 794; and see *post*, Chap. VIII. sect. 2.

¹ 3 Kent, (5th ed.) 324, 325; *Bradley v. Maryland Ins. Co.* 12 Peters, (U. S.) 378; *Rhinclander v. Ins. Co. of Pennsylv.* 4 Cranch, 29; *Pezant v. National Ins. Co.* 15 Wendell, 460; *Lovering v. Mercantile Ins. Co.* 12 Pick. 348; *Lee v. Boardman*, 3 Mass. 238; *Parsons, Ch. J.*, in *Wood v. Lincoln and Kennebec Ins. Co.* 6 Mass. 479, 482; *Dorr v. Union Ins. Co.* 8 Mass. 494; *Coolidge v. Gloucester Ins. Co.* 15 Mass. 341; *Munson v. Newbury Ins. Co.* 4 Mass. 88; *Rhinclander v. Ins. Co. of Pennsylv.* 4 Cranch, 29; *Dutilleul v. Gadliff*, 4 Cranch, 31, n.; 4 Dallas, 446; *Bordes v. Hallet*, 1 Caines, 444; *Jumel v. Mar. Ins. Co.* 7 John. 412.

General doctrine of total loss and abandonment.

the action is brought, is to be regarded as the criterion of the right to recover as for a total loss ; and if, at that time, what had antecedently been a total loss has by subsequent events ceased to be so, and become an average loss merely, a compensation for an average loss can alone be recovered." (o)

Illustration of the difference between our own and the foreign law as to abandonment.

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Hence, supposing the shipowner to have given notice of abandonment immediately on hearing of his ship's being captured, and while the state of capture still continued ; if, after giving such notice, but before commencing any action against the underwriters for the loss, the ship is recaptured and brought back to port in a partially damaged state : in such case, in France and the United States, the underwriters, whether they had accepted the notice of abandonment or not, would be bound to pay the whole amount of their insurance, and take to the abandoned ship ; for the capture, which existed at the time the notice was given, was a justifiable ground of abandonment. In England, in the like case, unless they had bound themselves by acceptance, the underwriters would neither be compelled to take the ship, nor to pay more than a particular average loss.

Distinction between the right to abandon and the right to give notice of abandonment.

From this state of our law, it follows (and it is of great importance to bear this remark in mind,) that a distinction exists in this country, which is not to be met with elsewhere, between the state of facts which will entitle the assured to give *notice of abandonment*, and those which will entitle him, after having given such notice, to insist upon it and *recover as for a total loss*. "It does not follow," says Mr. J. Le Blanc, "that a man has a right to ABANDON, because he has a right to give NOTICE OF ABANDONMENT on the faith of the intelligence received." (p)

A *notice of abandonment*, indeed, in our law, may or may not operate as an abandonment in fact, according to the ultimate situation of the property intended to be abandoned ; and it must, therefore, be carefully distinguished from an *abandonment*, as that word is employed generally by the American and continental jurists in the sense of a *virtual and irrevocable transfer of all the abandoned property*, quite *irrespective of its subsequent restoration*.

(o) Per Lord Ellenborough in *M'Iver v. Henderson*, 4 Maule & Sel. 584.

(p) Per Le Blanc J. in *Bainbridge v. Neilson*, 10 East, p. 345.

Where, however, the underwriter has accepted the notice of abandonment, or where the totality of the loss continues down to the commencement of the action, a notice of abandonment, if originally valid, has precisely the same effect in this country as everywhere else.

In such cases it operates, both here and elsewhere, as a complete and effectual transfer of property from the assured to the underwriters (*q*); who, in the language of the continental jurists, are, by virtue of it, *subrogated* into the place *of the assured (*par le délaissement l'assuré subroge les assureurs en son lieu et place. (r)*) It has even a retrospective effect, and operates as an assignment of the property, not only from the time when it was given, but from the moment of the loss which justified it (*s*); so that the underwriters are presumed, to the extent of their respective subscriptions, to have been the owners of the thing insured from the period of the loss. (*t*)

In a word, *a valid notice of abandonment, under the limitations already indicated, has a retrospective effect, and does of itself, and without any deed of cession, transfer the right of property to the underwriters, to the extent of the insurance, from the moment of the loss. (u)*

Such is a general outline of the doctrine of abandonment; a doctrine which, upon the continental system, seems undoubtedly opposed to the true principles of indemnity in marine insurance; for it is difficult to see upon what ground the underwriters should have thrown upon them the compulsory proprietorship of that which may prove more detrimental than advantageous; and cases may easily be put in which the assured, on the one hand, by the exercise of this privilege, may recover more than he has lost; and the underwriter, on the other, have ultimately to pay more than the whole amount of the assurance. (*v*)

Even under our own more limited system, a great dis-

General doctrine of total loss and abandonment.

Where, however, a notice of abandonment has been accepted, or is not defeated by the subsequent restoration of the property, it operates in itself as a transfer of property.

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And this from the time of the loss.

Effect of a valid abandonment.

Principles upon which the right of abandonment rests.

(*q*) Guidon, chap. vii. art. 1. in Pardessus, *Lois Maritimes*, vol. ii. p. 400; and see *post*, Chap. IX. Sect. 6.

(*r*) Emerigon, chap. xvii. sect. 4. vol. ii. p. 222. ed. 1827.

(*s*) 2 Phillips on Ins. 418.

(*t*) See *post*, Chap. IX. Sect. 6 for the proof of this position.

(*u*) See Emerigon, chap. xvii. sect. vi. § 4. vol. ii. p. 232. 3 Kent's Comm. (5th ed.) 319, *post*, Chap. IX. Sect. 6.

(*v*) Emerigon, chap. xvii. sect. 1. vol. ii. p. 207, ed. 1827. Benecké, *Pr. of Indem.* 337, 338.

General doctrine of total loss and abandonment.

The right of abandonment was more discouraged formerly in the English courts than at present.

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Utility of abandonment.

inclination was formerly shown by the English judges to encourage or extend the application of the doctrine (*w*): Lord Ellenborough on one occasion spoke of it as a desperate risk cast on the underwriter, who is to save himself as well as he can" (*x*); and during the whole time he presided in the *Court of King's Bench he uniformly endeavored to restrain the practice within narrow limits.

The recent tendency of the courts, however, both in this country and the United States, has unquestionably been to give a reasonable facility and extension to the practice of abandonment(*y*): and there can be no doubt, that, if restrained within due limits, this practice gives a direct encouragement to mercantile enterprise.¹

To all, indeed, who are engaged in commercial speculations, it is of the last importance to have a ready and quick command over their capital, so as to be enabled at once to withdraw it from any adventure that appears likely to be losing, and invest it in another that promises to be lucrative. Suppose, then, a merchant or shipowner to have received information of some marine casualty, such as capture or stranding, which renders the total loss of his property highly probable, but not absolutely certain — what is he to do under such circumstances? To have his funds locked up during the whole time he is waiting the ultimate issue of the accident would be almost as disastrous as the absolute total loss of his property: in fact, more so, for in the latter case he would have an immediate claim on the underwriter for the amount of his subscription. The claim, therefore, which he would have a right to make in case of an *absolute* total loss, the law allows him to make in these cases of *probable* and highly imminent total loss: it allows him to release himself from his embarrassment, and deal with the underwriters on the same terms as though a total loss had actually occurred, on con-

(*w*) See the opinions of Lord Mansfield in *Goss v. Withers*, 2 Burr. 683, and Mr. J. Buller in *Mitchell v. Edie*, 1 T. Rep. 616.

(*x*) In *Bainbridge v. Neilson*, 10 East, 341.

(*y*) For England, see the judgment in *Roux v. Salvador*, 3 B. N. C. 288. In the United States, see the judgment of Mr. J. Story in *† Peele v. Merchant's Ins. Comp.* 3 Mason's Rep. 27. 3 Kent's Comm. (5th ed.) 321, 322.

¹ See the remarks in note, *post*, 1032.

dition of his abandoning to them all his interest in the subject insured, and all his rights of recovering it. (z)

General doctrine of total loss and abandonment.

Meaning of the term "constructive total loss."

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Hence it is that those cases in which alone abandonment is either required or allowed are called cases of *constructive* *total loss: for, although in such cases the total loss is only highly *probable*, the law, by its *construction*, attributes to them the same effect which is attached to cases where the total loss is absolute, viz., that of entitling the assured immediately to demand from the underwriter the whole amount of the insurance. (a) What amounts to a case of constructive total loss is nowhere accurately defined in English law, but forms, as we shall presently see, a difficult and intricate matter of investigation.

Abandonment necessary in cases of constructive total loss.

In all cases of constructive total loss, *if the assured wishes to be in a position at once to claim the whole amount of the insurance*, he must, as a necessary preliminary, give due notice of abandonment to the underwriters, it being an elementary principle on this subject that "where the thing insured *subsists in specie, and there is a chance of its recovery, in order to make it a total loss* there must be an abandonment." (c) ¹

The assured, indeed, even in these cases, has always his election, whether to abandon or not: for there is no rule making abandonment in any case necessary *in the abstract*, and irrespective of the object of recovering as for a total loss.

"A party," says Lord Ellenborough, "is not in any case *obliged to abandon*; neither will the want of abandonment oust him from his claim for that which is, in fact, either an average or a total loss, as the case may be." — "Where there is an abandonment, the risk is thrown upon the underwriters;

But only necessary in order to make a constructive total loss.

(z) Per Lord Mansfield in *Goss v. Wilbers*, 2 Burr. 683. *Hamilton v. Mendes*, *ibid.* 1127. a opéré la perte réelle de ces mêmes choses. Boulay-Paty on Emerigon, chap. xvii. sect. 2, vol. ii. p. 217, ed. 1827.

(a) La perte légale est une présomption qui suppose, que la cause à laquelle elle attache l'effet d'autoriser le délaissement, (c) Per Lord Ellenborough in *Tuano v. Edwards*, 12 East, 491.

¹ *Smith v. Manuf. Ins. Co.* 7 Metcalf, 448; *Pierce v. Ocean Ins. Co.* 18 Pick. 91; *Gordon v. Mass. F. & M. Ins. Co.* 2 Pick. 249; *post*, 1052; 3 Kent, (5th ed.) 320; Per Shaw, Ch. J., in *Loving v. Mercantile Marine Ins. Co.* 12 Pick. 359.

General doctrine of total loss and abandonment.

In cases of absolute total loss it is nugatory.

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In cases of partial loss inoperative and inadmissible.

Division of the subject.

where there is *none*, a party takes the chance of recovering, according to his actual loss. *Abandonment is only necessary to make a constructive total loss.*" (d) ¹

It is only, indeed, in cases where the assured wishes to recover the whole amount of the insurance, upon the occurrence of a loss which does not produce the absolute destruction of the thing insured, that an abandonment is either necessary or allowable. In cases of *absolute* total loss it is considered, as we shall presently see, to be a mere idle ceremony. (e)

And in cases of *partial loss*, however great may be the amount of the damage, it is wholly inoperative and inadmissible: for it is a fixed principle in this branch of the law, that no merely partial loss — no loss, that is, which neither immediately produces, nor ultimately tends to produce, the total destruction or privation of the thing insured — can be converted into a constructive total loss by means of abandonment. (f) "There is not any principle," says Lord Ellenborough, "which authorizes an abandonment, unless where the loss has been actually total, or in the highest degree probable at the time of abandonment." (g)

Having thus endeavored to give a general view of the doctrine of total loss and abandonment, we will proceed to consider, 1. Those cases (*of absolute total loss*) in which no notice of abandonment is required (h); 2. Those cases (*of constructive total loss*) in which the whole amount of the in-

(d) Per Lord Ellenborough in *Mellish v. Andrews*, 15 East, 18. See also per Lord Abinger in *Roux v. Salvador*, 3 Bingh. N. C. 287.

(f) *Caslet v. St. Barbe*, 1 T. Rep. 187.

(g) In *Anderson v. Wallis*, 2 Maule & Sel. 240.

(h) Chap. VII. *post*, 1000.

(e) See *post*, p. 1004.

¹ "All the books agree that the assured is never obliged to abandon; and if he does not, he is always entitled to recover to the extent of his loss. The object of abandonment is to turn that into a total loss which would otherwise not be so." Per Kent, Ch. J., in *Gracie v. N. York Ins. Co.* 8 John. 244; *Booley v. Chesapeake Ins. Co.* 3 Gill & John. 450; *Marean v. U. States Ins. Co.* 3 Wash. C. C. 256; *Murray v. Ins. Co. of Pennsylv.* 2 Wash. C. C. 186. "The right to abandon is a privilege which the assured may exercise or not, at his option; and whether the loss exceed or fall short of half the value, the assured, without abandonment, may always recover an indemnity according to the full amount of his actual loss proved." Per Shaw, Ch. J., in *Pierce v. Ocean Ins. Co.* 18 Pick. 91, 92.

insurance can only be recovered on giving notice of abandonment (i) ; 3. The particular requisites of a valid notice of abandonment ; and the effects of abandonment on the rights and liabilities of the assured and the underwriters. (j)

General doctrine of total loss and abandonment.

(i) Chap. VIII. *post*, 1052.

(j) Chap. IX. *post*, 1157.

OF ABSOLUTE TOTAL LOSS, OR TOTAL LOSS WITHOUT NOTICE
OF ABANDONMENT.

SECT. I. *Cases of Absolute Total Loss on Ship and Goods
generally.*

Cases of absolute total loss on ship and goods generally.

Cases of absolute total loss.

§ 365. AN absolute total loss being, as we have already seen, one which gives the assured a right to claim from the underwriter the whole amount of his subscription without notice of abandonment, it remains to inquire what kind of casualty amounts to a case of absolute total loss.

No better or more comprehensive answer can be given to this inquiry than in the words of Lord Abinger, already cited: "If, in the course of the voyage, the thing insured becomes totally destroyed or annihilated, or if it be placed *by the perils insured against* in such a position that it is totally out of the power of the assured or the underwriter to procure its arrival, the latter is bound, by the very terms of his contract to pay the whole sum insured." (a)

Principle on which the doctrine of absolute total loss depends.

The great principle, therefore, on which all the cases of absolute total loss depend appears to be this—the *impossibility*, owing to the perils insured against, of ever procuring the arrival of the thing insured according to the terms of the policy.

If, by reason of those perils operating on the subject insured, the assured is permanently and irretrievably deprived not only of all present possession and control over it, but of all reasonable hope or possibility of ever ultimately recovering possession of, or further prosecuting the adventure upon it, that is a case of absolute total loss: in
*such case there is no *spes recuperandi* at all; the loss is

(a) Per Lord Abinger in *Roux v. Salvador*, 3 Bingh. N. C. 286.

absolutely and of itself total, independently of the election of the assured to treat it as such; and he is, therefore, entitled to recover from the underwriter the whole amount of his insurance without giving any notice of abandonment.¹ In fact it is obvious that a notice of abandonment would in such case be a mere idle formality: abandonment presents to the mind the notion of a thing existing in whole or in part, or, at all events, the notion of a doubtful existence (*spem recuperandi*); and it is a plain absurdity to require the assured formally to relinquish to the underwriters the hope of recovering that, of which the recovery is hopeless, or a right of property in that, which is irretrievably lost or irreparably destroyed. (b) In such cases, therefore, no abandonment is required; but if any remains of the wrecked ship or perished goods ultimately come to hand, or if any money have been realized abroad by their necessary and justifiable sale, such remains, or the net proceeds of such sale, as we shall elsewhere see, are considered as a salvage to which the underwriters are entitled after payment of a total loss. (c) Hence it is that absolute total losses are familiarly known in insurance law as "*salvage losses without abandonment*."

Cases of absolute total loss on ship and goods generally.

No notice of abandonment requisite in cases of absolute total loss.

But the remains of the property or its proceeds are a salvage for the benefit of the underwriters.

Such, then, being the general principle on which the whole doctrine of absolute total loss depends, it will be found that all the cases of total loss in which no notice of abandonment is requisite may be ranged under the two comprehensive classes indicated by Lord Abinger, those, viz., in which, 1st, the thing insured is wholly destroyed or annihilated by the perils insured against, or, 2nd, is by the same perils wholly and irretrievably lost to the assured, so that it is totally out of his power or that of the underwriter to procure its arrival.

Two classes of cases of absolute total loss.

(b) *Lex non cogit ad absurdum*. En cas de perte entière le délaissement est une formalité inutile. Emerigon, chap. xvii. sect. 3, vol. ii. p. 213, ed. 1827. "The general convenience of making an abandonment has led to the notion that it is more necessary than it really is—it is only necessary to make a constructive

total loss—if the loss is actually total no abandonment is necessary. Per Lord Ellenborough, 15 East, 13; see also Benecké, Pr. of Indem. 414.

(c) Per Lord Abinger in *Roux v. Salvador*, 3 Bingh. N. C. 288. See *post*, Chap. IX. Sect. 6.

¹ *Post*, 1021, note; *Robinson v. Commonwealth Ins. Co.* 3 Sumner, 220; *Portsmouth Ins. Co. v. Brasee*, 16 Ohio, 81.

Cases of absolute total loss on ship and goods generally.

1002*

What is meant by a thing's being "wholly destroyed or annihilated" in insurance law.

*With regard to the first head the question arises, what is meant by the words "*wholly destroyed or annihilated* by the perils insured against," as applied to the subjects of marine insurance.

As to this point, it is quite clear that these words cannot mean wholly destroyed or *annihilated in essence*, i. e. reduced to absolute nothingness, so as no longer to exist in *naturâ rerum*: strictly speaking, a change of this kind *from entity into non-entity* is even a physical impossibility, and must, therefore, of course, be thrown out of consideration in treating of a contract of practical indemnity against substantial losses: it is, therefore, clear beyond a doubt, that if the thing insured go in bulk to the bottom of the ocean, or be reduced by fire to a heap of ashes, though, in either case, its *remains* have an existence in *naturâ rerum*, yet the *thing* itself is practically, and, as a subject of insurance, wholly destroyed, so as to entitle the assured, without notice of abandonment, to claim a total loss. (d) As it has been well said in the United States, although, even in the case of a ship foundered or burnt at sea, every possible chance of salvage is by no means at an end, yet, in the technical sense of a total loss and for every beneficial purpose to which a contract of insurance can be applied, a ship foundered or burnt at sea is specifically, and, *as a ship*, wholly destroyed." (e)

Wreck involving either complete dismemberment, or destruction *as a ship*.

On the same principle, if the thing insured, in the course of the voyage, be, by the perils insured against, reduced to a complete state of dismemberment, so as to have lost its characteristic form, and no longer to subsist under the same denomination as that which it was insured as being, this is an absolute total loss within the meaning of the policy, though its constituent parts may all, or in great proportion, exist separately: thus, if a ship in the course of the voyage be "dismembered by the perils of the seas," if, in a word, she "*be wrecked in pieces*," so that "*her planks and apparel be scattered about in the sea*," this is a clear case of absolute *total loss on ship; and it seems equally so where, though her hull may still hold together, yet the ship, *as a ship*, is de-

1003*

(d) See Emerigon, chap. xvii. sect. 3, Hatch, 6 Mass. Rep. 465, cited 2 Phillips vol. ii. p. 213, ed. 1827.

(e) Per Mr. J. Sewall, † Murray v.

stroyed, and subsists only as a *wreck*; nor is any notice of abandonment requisite in such cases to entitle the assured to claim a total loss. (*f*)

Cases of absolute total loss on ship and goods generally.

In case of perishable goods.

The great difficulty has arisen in determining when perishable goods shall be so far regarded as wholly destroyed and annihilated within the true meaning of these words in insurance law, as to give the assured a right to recover the whole sum insured on them without notice of abandonment: in one sense commodities of a perishable nature may be said to be wholly destroyed for any practical purpose, when, by the progress of decomposition or other chemical agency, they have undergone a physical change of structure so as no longer to remain the *same kind of thing* as before: in such case the thing insured, in the words of Emerigon, "*a cessé d'exister en essence, et dans la nature qui lui est propre.*" (*g*)

Physical change of structure by decomposition.

The question then is, whether, if this physical change of structure have had its origin in the perils insured against, this is an absolute total loss within the policy on the commodities so destroyed: thus, suppose hides, fish, fruit, or other perishable articles, to have become changed in the course of the voyage by the agency of fermentation or putrefaction originating in sea-damage, into a mass of rottenness, so as to have wholly lost all salable value, *as hides, fish, or fruit*, though they may produce a trifling sum if sold for *glue or manure*, is this an absolute total loss under the policy?

Where all possible or reasonable chance of procuring the thing insured is at an end, this is a case of absolute total loss.

* 1004

Foundering at sea.

Reserving the further discussion of this question for another place (*h*), we will proceed to give some illustrations of the principle, that, where the thing insured is placed, by the perils insured against, in such a position that it is totally out of the power of the assured or the underwriter to procure its *arrival, no notice of abandonment is requisite to give the assured a claim to a total loss.

Thus, if the ship founders at sea, or goods go in bulk to the bottom of the ocean, so as to leave no assignable chance of their recovery, this is a clear case of *absolute total loss*: if, on the other hand, they be merely submerged in shallow

(*f*) *Les débris du navire naufragé existent, mais le navire n'existe plus.* Emerigon, vol. ii. p. 213. ed. 1827. Cambridge

(*g*) Chap. xvii. sect. 3. vol. ii. p. 213. v. Anderton, Ry. & Mood. 60. S. C. 1 ed. 1827.

Carr. & P. 213. and 2 B. & Cr. 691. See (*h*) See Secta. III. and IV. post.

Cases of absolute total loss on ship and goods generally.

Submersion.

water, so that there is a chance of getting them up again, though at a cost probably greater than their value when recovered, this is only a *constructive total loss*, and the assured, in order to recover the whole amount of the insurance, must give due notice of abandonment. (i)¹

On the same principles, the assured, on the expiration of the time after which the legal presumption arises that a missing ship has foundered at sea, may claim a total loss, without notice of abandonment; for it would, indeed, be absurd to require from the assured a formal abandonment of his chance of recovering that which the law presumes to be irrecoverably lost. If, however, such ship should ultimately chance to turn up, this would be for the benefit of the underwriters, who might claim her as salvage. (j)

Every effective privation of the *spes recuperandi* continuing down to the time of action brought is a case of absolute total loss.

Every effective privation of the spes recuperandi amounts to an absolute total loss: if the thing insured be in the hands of strangers, not under the control of the assured; if, by any circumstances over which he has no control, it can never, or within no assignable period, be brought to its original destination — in such cases the circumstances of its remaining in

(i) *Anderson v. Royal Exch. Comp.* 7 East, 38. *Doyle v. Dallas*, 1 Mood. & Rob. 48. S. L. in United States, see *Sewall v. United St. Ins. Comp.* 11 Pick. Rep. 90, cited 2 Phillips on Ins. 260. *ment*," but he does not cite any authority which shows abandonment to be necessary; in the United States it has been decided not to be requisite in such case. † *Cambreling v. McCall*, 2 Dallas Rep. 280, cited 2 Phillips, 235. ‹ *Gordon v.*

(j) *Houstman v. Thornton*, Holt's N. P. 242. Mr. Marshall says the assured, in this case, may recover "on abandon-
Bowne, 2 John. 150. ›

¹ The submersion of a ship insured, is, or is not, a total loss, according to the circumstances. *Sewall v. United States Ins. Co.* 11 Pick. 90; *Peele v. Suffolk Ins. Co.* 7 Pick. 257. Stranding does not, in all cases, give the right of abandoning the ship. *Wood v. Lincoln and Kennebec Ins. Co.* 6 Mass. 479; *Patrick v. Commercial Ins. Co.* 11 John. 13; *Peele v. Merchant's Ins. Co.* 3 Mason, 27; *King v. Middletown Ins. Co.* 1 Connect. 184; *Church v. Marine Ins. Co.* 1 Mason, 341; *Bosley v. Chesapeake Ins. Co.* 3 Gill & John. 450. But where a vessel, in attempting to go through Hurlgate, was thrown upon the rocks, her rudder and a great part of her keel were knocked off, and one of her sides was beaten in, so that the whole of her cargo, consisting of salt, was washed out and lost, the court directed the jury that, if they should find that the vessel, while in this situation, was in extreme danger of utter destruction, the insured having abandoned her before she was got off, had a right to recover for a total loss; and the direction was held to be correct. *King v. Middletown Ins. Co.* 1 Conn. 184. See *King v. Hartford Ins. Co.* 1 Conn. 333. Where, however, the vessel is delivered of her peril, however imminent it may have been, before the abandonment, the abandonment for that cause will not be valid. *Hall v. Franklin Ins. Co.* 9 Pick 466; *Smith v. Universal Ins. Co.* 6 Wheaton, 176.

specie at any forced termination of the risk is of no importance. The loss is *in its nature* total to him who has no means of recovering his property, whether his inability arise from its annihilation, or from any other insuperable obstacle. (k)

Cases of absolute total loss on ship and goods generally.

* 1005

*In such cases, if the privation continues effective down to the time of action brought, the assured may recover a total loss, though he has given no, or only an insufficient, notice of abandonment: in fact, as Lord Ellenborough says, "the want of abandonment will not oust the party of his claim for that which is, in fact, either an average or a total loss, as the case may be: where there is an abandonment, the risk is thrown on the underwriter; where there is none, the party takes the chance of recovering according to his actual loss (l), i. e., according to the nature of his damnification at the time of action brought. (m)

Goods were insured "from London to the Isle of France, &c.:" the ship was wrecked off the coast of that island, but some of the goods were saved from the wreck, and got on shore there, where, however, they fell into the hands of the natives, who destroyed part, and plundered the rest. The assured claimed a total loss. It was objected to his claim, that he had given no notice of abandonment. Sir Vicary Gibbs overruled the objection, and said "an abandonment is not necessary to make this a total loss: the portion of the goods which were saved from the wreck, though got on shore, *never came again into the hands of the owners*; it is, therefore, a total loss to them." (n)

Goods plundered by wreckers, so as never again to come into the hands of their owners. *Bondrett v. Hentigg, Holt, N. P. 149.*

Goods having been insured on a Baltic risk, the ship, while under repair in a Swedish port, was seized and detained by orders of the Swedish government: the assured, on receipt of this intelligence, gave a notice of abandonment, which was too late, and wholly inoperative: afterwards, and about two months before action brought, the goods themselves were seized and unladen by a military force acting under the orders of the Swedish government, and *never restored*: it was contended that, as the notice of abandonment given on hearing of the *ship's detention* was invalid, the assured could not

Goods seized by hostile force, and *never restored*. *Mellish v. Andrews, 15 East, 13.*

(k) See the remarks of Lord Abinger, 3 Bingh. N. C. 279.

(m) Per Lord Ellenborough in *M'Iver v. Henderson*, 4 Maule & Sel. 584.

(l) Per Lord Ellenborough in *Mellish v. Andrews*, 15 East, 15.

(n) *Bondrett v. Hentigg, Holt's N. P. Rep. 149.*

Cases of absolute total loss on ship and goods generally.

1006 *

Where goods are taken out of ship, condemned and sold, and proceeds not restored before action brought, no notice of abandonment is necessary to make the loss total.
Mullett v. Sheddin,
13 East, 304.

Aliter, where goods after seizure and condemnation remain on board ship unsold and are finally restored.

Remarks on this case.

*rely upon the subsequent *seizure of the goods* as an absolute total loss. The court, however, held that, as in this case the loss on the goods continued absolutely total at the time of action brought, the plaintiff might recover accordingly, without any notice of abandonment. (a) ¹

A cargo of saltpetre having been shipped in the East Indies by an American citizen, under license from the company, was insured on his account for a voyage from Calcutta to a port of discharge in the United States: the ship, with the saltpetre on board, having, in the course of this voyage, touched at the Cape of Good Hope, was seized and detained there by a British man-of-war, and the saltpetre libelled in the Vice Admiralty Court, under decrees of which it was *unshipped and sold at the Cape, for the benefit of the captors*: subsequently (before action brought) this decree was reversed on appeal, and the property, or the proceeds of the sale, directed to be restored to the agents of the assured, upon payment of the captor's costs; *but down to the time of action brought, no part of the saltpetre, or of the proceeds of the sale, had been received, either by the assured or his agent*. The assured having claimed a total loss, it was objected that he had given no valid notice of abandonment. Lord Ellenborough, however, and the Court of King's Bench held, that no such notice was necessary under the circumstances. "If," said his lordship, "instead of the saltpetre *having been taken out of the ship and sold, and the property devested, and the subject-matter lost to the owner*, it had remained on board the ship, and been restored at last to the owner, I should have thought there was much in the argument, that, in order to make it a total loss, there should have been notice of abandonment, and that such notice should have been given sooner; *but here the property itself was wholly lost to the owner; and, therefore, the necessity of any abandonment was altogether done away.*" (p)

In this case, as it was remarked by Lord Ellenborough

(a) Mellish v. Andrews, 15 East, 13. See judgment of Lord Ellenborough, *ibid*.
(p) Mullett v. Sheddin, 13 East, 304. 310.

¹ See Watson v. Ins. Co. of N. A. 1 Binney, 47; Brown v. Phoenix Ins. Co. 4 Binney, 445; Barney v. Maryland Ins. Co. 5 Harr. & John. 138.

*and Mr. J. Bayley in the course of the argument, no circumstance had happened before action brought to *make the original detention* (which was the cause of loss alleged in the declaration) *less than a total loss*; "the assured," said Lord Ellenborough, "*stands upon the actual destruction as to him of the thing insured, which precludes the necessity of any notice to abandon it.*" (q) The effective privation of his property continued total as to the assured down to the time of bringing his action; and this is the true point of distinction upon which the case rests.

Cases of absolute total loss on ship and goods generally.

* 1007

If, indeed, goods are seized and confiscated by a hostile government, subject to a pending claim for their restoration, which ultimately results in the restoration of a part of the goods, or their proceeds, into the hands of the assured or his agents, *before action brought*—in such case the assured cannot recover for a total loss without having given due notice of abandonment. Thus, where sugars, insured from London to Rotterdam, were, on arrival there, seized, and afterwards confiscated and sold, by the orders and for the benefit of the Dutch government, but, in consequence of strong remonstrances, half the proceeds were subsequently restored, and paid to the consignees in Rotterdam, *who handed them over to the assured*—Lord Ellenborough intimated that the assured, *after such restoration*, could not have brought his action, and recovered as for a total loss, unless he had given due notice of abandonment. (r)

Confiscation of goods followed by ultimate restitution of part before action brought is a total loss only where notice of abandonment has been given and accepted: otherwise an average loss. *Tunno v. Edwards*, 12 East, 488.

In a similar case, where coffee had been seized and confiscated by the Danish government, but the consignees abroad were allowed to conduct the sale, and to re-imburse themselves, out of the proceeds, the amount of the bills which they had *accepted and paid on account of the assured upon the credit of the consignment*, Mr. J. Gibbs said, "If the plaintiff had brought an action *after the salvage* (i. e. the amount received by him from the consignees on their acceptances, and which had been allowed them out of the proceeds of the sale) for a *total loss*, the defendant would have non-suited him for want of an abandonment. I do not state that, upon seizure, the plaintiff might not sue for a total loss without abandonment;

Goldsmid v. Gillies, 4 Taunt. 802.

* 1008

(q) *Mullett v. Shedden*, 13 East, 309. Such seems to be the true result of the case, as far as it applies to the distinction
< See 2 Calves, 208. 1 John. 181. >
(r) *Tunno v. Edwards*, 12 East, 488. now in question.

Cases of absolute total loss on ship and goods generally.

Result of these cases.

Where thing insured subsists in specie, and there is a chance of its recovery, notice of abandonment is necessary to make a total loss.

Where there is no such chance, the fact of its subsisting in specie at the time of the casualty or sale, is of no importance.

1009 *

Assured, by taking to proceeds of sale, may waive his right to recover as for a total loss.

but, *after the restoration, no abandonment having been declared in the meantime*, that which was for a time a total loss became an average loss; and then, all that is restored, is restored for the benefit of the assured, not of the underwriter." (s)

In these two cases the point as to notice of abandonment was only indirectly raised; and the true result of both appears simply to be: that the assured, on seizure and confiscation of his goods, may claim a total loss without notice of abandonment, if he pleases; that, if no restoration takes place before action brought, he may recover in such action the whole amount he claims: but if, before that time, a restoration of any part takes place, he can only recover an average loss; in order to recover as for a total loss under such circumstances, *in any event*, he must give due notice of abandonment. In fact, as Lord Ellenborough says in *Mellish v. Andrews*, "where there is an abandonment, the risk is thrown on the underwriters; where there is no abandonment, the party takes the chance of recovering according to his actual loss." (t)

In the case of *Tunno v. Edwards*, Lord Ellenborough says, "Is it not an established and familiar rule of insurance law that, where the *thing insured subsists in specie, and there is a chance of its recovery*, in order to make it a total loss there must be an abandonment?" This is, no doubt, the rule; but then both its terms must be carefully attended to; the mere fact that the thing insured *subsists in specie* at the time of the loss does not render it necessary to give notice of abandonment, unless there is also at that time a *chance of its recovery*: where there is no such chance, the mere circumstance of its subsisting in specie at the time of the casualty is of no importance. "The loss," as Lord Abinger *says, "is, *in its nature*, total to him who has no means of recovering his property, whether his inability arise from its annihilation, or from any other insuperable obstacle." (u)¹

Even where such a loss has taken place, followed by sale, the assured may, by his own conduct, in electing to take to the proceeds of the sale, instead of making his claim against

(s) *Goldsmid v. Gillies*, 4 Taunt. 802.

(t) *Mellish v. Andrews*, 15 East, 16.

(u) Per Lord Abinger in *Roux v. Salvader*, 3 Bingh. N. C. 279.

¹ See *Robinson v. Commonwealth Ins. Co.*, 3 Sumner, 220, 224; *Patapsco Ins. Co. v. Southgate*, 5 Peters, (S. C.) 604.

the underwriters, if he thereby alters the position of facts, so as to affect their interests, forfeit his claim to recover for a total loss. (v)

Cases of absolute total loss on ship and goods generally.

And so, *e converso*, even in a case where they would otherwise be entitled to notice of abandonment, the underwriters, by their own conduct, may forfeit the right to insist upon it: as, where the assured, on hearing that his ship has put into port to repair in a disabled state, expresses his desire to the underwriters to abandon, but they dissuade him from it, and order the repairs to be made at their expense: this supersedes the necessity for any notice of abandonment, and the assured, without it, may recover the whole amount of the insurance. (w)

So the underwriter may, by his own conduct, waive his right to notice of abandonment.

SECT. II. *Absolute total Loss of Ship in cases of Wreck, or Irreparability followed by Sale.*

§ 366. Where the ship in the course of the voyage and by the agency of the perils insured against, becomes an absolute wreck — where she has been broken in pieces and dismembered, so that “her planks and apparel are scattered on the sea (x);” this is a case of absolute total loss on ship, “although the whole or a greater part of the fragments may reach the shore as wreck.” (y) In such case it is quite clear that the ship, *as a ship*, is totally destroyed; — the *ship* has perished, only the *wreck* remains. *Les débris du navire naufragé existent mais, le navire n'existe plus.* (z)

Absolute total loss of ship in cases of wreck, or irreparability followed by sale.

Where the ship is wrecked in pieces, no notice of abandonment is requisite.

* 1010

No doubt, accordingly, has ever existed, that in a case of this kind the assured may recover the whole amount of the insurance without any notice of abandonment, it being understood that the wreck which comes to hand is a salvage for the benefit of the underwriter.

It is now also established by the recent course of our jurisprudence, that, although the damage done to the ship

And the rule is the same where the ship,

(v) *Mitchell v. Edie*, 1 T. Rep. 608. And see, per Lord Abinger, *Roux v. Salvador*, 3 Bingh. N. C. 266. See also, *S. P. Allwood v. Henckell*, Park on Ins. 309, 8th ed.

(w) *Da Costa v. Newham*, 2 T. Rep. 497.

(x) Per Dallas, C. J. in *Bell v. Nixon*, Holt's N. Pr. 423.

(y) Opinion of the Judges delivered to the House of Lords, in *Irving v. Manning*, 8th July, 1847.

(z) *Emerigon*, chap. xvii. sect. 3, vol. ii. p. 213, ed. 1827.

Absolute total loss of ship in cases of wreck, or irreparability followed by sale.

though her planks may hold together, is yet so damaged that she either cannot be repaired at all so as to keep the sea as a ship, or only so repaired at a cost greater than her value when repaired, and is consequently sold where she lies.

In such cases, it is not *the sale* which makes the loss absolutely total, but the state of damage to which the ship has been reduced before the sale, and which makes that measure necessary.

1011 *

by the perils insured against, be somewhat short of this complete wreck, or actual dismemberment, although, that is, *her hull may hold together, and the form of a ship remain* — yet, if the damage be so great as to make it wholly impossible for the master, by any means in his power, to repair her so as to keep the sea as a ship, or to do so except at a cost that would exceed the ship's value when repaired; and the master consequently, acting *bona fide* and as a prudent owner would, if uninsured, sells the ship where she lies — the assured may treat this as an absolute total loss of the ship, and recover the whole amount of the insurance, without giving notice of abandonment. (a)

It must, however, carefully be borne in mind in these cases, that it is not the mere fact of sale which entitles the assured to recover without notice of abandonment; in the language of Mr. J. Bayley, "*there is no such head of insurance law as loss by sale*;" (b) that which entitles the assured to treat the loss in such cases as absolutely total, is the state to which the ship has been reduced by the perils insured against previous to the sale, and which alone justified the *master in selling. The loss, in fact, *before the sale*, must be total, independently of the election of the assured to treat it as such, in order to enable the assured *after* the sale, to recover for it as a total loss without notice of abandonment. Where this is not so, and a notice of abandonment would otherwise be requisite, in order to show that the assured elects to treat it as a total loss, the mere fact of the sale will not excuse the want of such notice. (c)¹

(a) *Idle v. Royal Exch. Ass. Comp.* 3 Moore, 115, 8 Taunt. 755. *Robertson v. Clarke*, 1 Bingh. 444. *Robertson v. Carruthers*, 2 Stark. 571. *Cambridge v. Amderton*, Ry. & Mood. 60, 1 Car. & P. 213. S. C. 2 B. & Cr. 691. *Doyle v. Dallas*, 1 M. & Rob. 48. *Gardner v. Salvador*, *ibid.* 116; and see judgment of Lord Abinger in *Roux v. Salvador*, 3 Bingh. N. C. 268, *overruling* the earlier cases of All-

wood *v. Hensckell*, Park on Ins. 399, 8th ed. *Hodgson v. Blackiston*, *ibid.* 400, note; and also, as to this point, the judgment of Tindal C. J. in *Roux v. Salvador*, 1 Bingh. N. C. 526.

(b) In *Gardner v. Salvador*, 1 Mood. & Rob. 117.

(c) See the very able argument of Mr. J. Maule (then at the bar) in *Roux v. Salvador*, 3 Bingh. N. C. 270.

¹ In *Gordon v. Mass. F. & M. Ins. Co.* 2 Pick. 267, Mr. Chief Justice Parker said; — "There certainly is much contrariety of opinion on this subject, but we think the principle on which the matter rests is, that where the property, though injured, is not destroyed, and the insured has any legal interest, which he can convey, he must

The following is the leading case by which the above position has been established in our jurisprudence.

A timber-laden ship, insured from Quebec to Bristol, in sailing down the St. Lawrence, struck upon the rocks, and got so fast set that the master, after making every possible effort, could not get her off, but was obliged to leave her there exposed to a heavy sea (*d*); having procured surveyors, and, amongst others, a Lloyd's agent from Quebec, to examine the vessel, she was found to be so damaged, that, although still retaining the form of a ship, she was only saved from going to pieces by the timber, which formed the greater part of the cargo; and, in the judgment of the surveyors, the expense of getting her off the rocks (if that could be accomplished,) and repairing her, would exceed her value when repaired: they, therefore, advised the master to sell her, which advice he, being ignorant of the insurance, complied with, and accordingly sold her in Quebec, *with her register*; the purchaser, having succeeded in getting her off the rocks, repaired, and sent her on another voyage, at the outset of which she was lost in the Gulf of St. Lawrence; the plaintiff, who had never given any notice of abandonment, brought his action for a total loss.

Absolute total loss of ship in cases of wreck, or irreparability followed by sale.

Cambridge v. Anderton, Ry. & Mood. 60; 1 Carr. & P. 231; 2 B. & C. 681; 4 Dowl. and Ryl. 203.

It was contended, for the defendant, that, as the ship still existed as a ship at the time of the casualty, and was sold, *not as a wreck to be broken up, but as a ship, with her register, to make another voyage, the sale was not justified;

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(*d*) Before the master left the ship to go to Quebec for advice, he had found, on examination, "that the keel had gone fore and aft, and pieces of it were washed on shore, the stem and grip were gone, and the ship was bilged, hogged, and twisted in such a manner that he considered it impossible to make her seaworthy." From the report of the case in 4 Dowl. & Ryl. 204.

abandon, in order to be entitled to claim for a total loss. On the other hand, where the property is destroyed, or the title is legally divested by a lawful sale, an abandonment is not necessary." See *Winn v. Columbian Ins. Co.* 12 Pick. 280, 282; Per Chancellor Walworth, in *American Ins. Co. v. Center*, 4 Wendell, 52; *Williams v. Suffolk Ins. Co.* 3 Sumner, 510; Per Putnam, J., in *Ortok v. Commonwealth Ins. Co.* 21 Pick. 464. Mr. Justice Thompson, giving the opinion of the Supreme Court of the United States, and referring to the case of *Gordon v. Massachusetts F. & M. Ins. Co.*, says;—"There is very respectable authority, and that too, founded upon pretty substantial reasons, for saying that no abandonment is necessary where the property has been lawfully transferred by a necessary and justifiable sale." *Patapasco Ins. Co. v. Southgate*, 5 Peters, (U. S.) 604.

Absolute total loss of ship in cases of wreck, or irreparability followed by sale.

Lord Tenterden to the jury at N. Pr.

at all events, it was urged that the plaintiff could not recover a total loss without notice of abandonment.

Lord Tenterden, before whom the case was tried, told the jury that the question was, whether this was a total or partial loss; and that, in considering that question, they should look *not so much at the acts of the parties, whether buyers or sellers, as at the state of the ship itself*. "If," said his lordship, "the jury are of opinion that this vessel could not be repaired at all, or that she could not be repaired without incurring an expense equal to, or greater than, her value, then I shall hold, *that, although she may exist in the form of a vessel, and be afterwards sold with her register, the plaintiff will be entitled to recover as for a total loss, with benefit of salvage.*" (e)

Judgment of the court in Banc.

When the case came before the court in banc, his lordship said, "If the subject-matter of insurance remained a ship, it was not a total loss; but if it were reduced to a *mere congeries of planks*, the vessel was a mere wreck: the name you may think fit to apply to it cannot alter the nature of the thing." Mr. J. Bayley, on the same occasion, said, "I take the legal principle to be this: if, by means of any of the perils insured against, the ship *ceases to retain that character, and becomes a wreck*, that is a total loss, and the master may sell her, and the assured may recover for a total loss, without notice of abandonment." (f)

Remarks on the case.

It is evident, from the above statement of the case (which is founded upon a collation of the two *Nisi Prius* reports with those in banc,) that the ship at the time of the sale was, as Lord Tenterden says, "a mere congeries of planks," *retaining the form of a ship indeed, but so far damaged as to have ceased to exist for any useful purposes as a ship. "She was, therefore," as Lord Tenterden expressed himself in a subsequent case, "no longer to be deemed a ship, but rather materials for another ship." (g)

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(e) Ry. & Mood. 61; and see, also, 1 Allen v. Sugrue, 8 B. & C. 561, 3 M. & Carr. & P. 214.

(f) Cambridge v. Anderton, 2 B. & Cr. 691, 4 Dowl. & Ry. 203, S. C. Ry. & Mood. 60, 1 Car. & P. 213; see S. P. Robertson v. Clarke, 1 Bing. 456, 8 Moore,

622, where the loss was also held total without notice of abandonment; see also

Allen v. Sugrue, 8 B. & C. 561, 3 M. & Ry. 9, at N. P. Danson & Lloyd, 188; in this case, however, as appears by the N. P. report, notice of abandonment was given.

(g) In Allen v. Sugrue, Dana. & Ll. 192.

And the case is a direct authority for the position, that when a ship reduced to such a state is sold abroad, the plaintiff need give no notice of abandonment in order to recover as for a total loss.¹

Absolute total loss of ship in cases of wreck, or irreparability followed by sale.

In a subsequent case the *owner* of a ship which had sunk, Buenos Ayres Roads, sold her as she lay, because, in the opinion of surveyors, among whom was a Lloyd's agent, the expense of raising her (even if she could be raised at all) would probably be more than she was worth: *it was admitted that no effectual notice of abandonment was in fact given*: and the question as to the totality of the loss was put entirely upon the point, whether the sale was justified under the circumstances. The jury having, upon the facts, found that the sale was not justified, a verdict passed for the defendant, which the court, on application for a new trial, refused to disturb (A): had their decision been the other way, it certainly appears, from the whole tenor of Lord Tenterden's summing up, that the want of notice of abandonment would have been held no objection to the plaintiff's right to recover for a total loss; and the case, in this view, is an authority for the position that a sale of ship by the owner abroad, if justified by the apparent impossibility of recovering the ship at all, or at an expense less than her worth when recovered, gives a right to claim the whole amount of the insurance without notice of abandonment.

Doyle v. Dallas, 1 Mood. & Rob. 48.

In another case, which came before the court very shortly afterwards, a total loss was claimed upon a ship which had been driven on rocks in the course of her voyage, and sold by the master where she lay, under the advice of surveyors, who were of opinion that she was a *complete wreck and that it was impossible to get her off*: no notice of abandonment is stated to have been given, and no point as to want of notice appears to have been raised. Mr. J. Bayley said to the jury, "The question in this case is, whether you are satisfied there has been a total loss by the perils of the seas. *I know of no such head in insurance law as loss by sale*. If the situation of

Gardner v. Salvador, 1 Mood. & Rob. 116.

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Summing up of Mr. J. Bayley.

(A) Doyle v. Dallas, 1 Mood. & Rob. case will be cited at greater length in the 48, ruling of Lord Tenterden, p. 54. This next chapter.

¹ Ante, 1011, in note.

Absolute total loss of ship in cases of wreck, or irreparability followed by sale.

the ship be such that *by no means within the master's reach it can be treated so as to retain the character of a ship*, then it is a total loss. If the master, by means within his reach, can make an experiment to save it, *with a fair hope of restoring it to the character of a ship* (i. e. a sea-going vessel,) *he cannot by selling, turn it into a total loss.* *Bona fides* in the master will not decide the question, for if he sells erroneously what is entitled to the character of a ship, though he thinks it a wreck, it will not do." (i)

Result of the cases.

It appears, then, that these authorities support, or, at all events, are not inconsistent with, the position established by *Cambridge v. Anderton*, that, when a ship is sold by the master, or owner (j), under such circumstances that, though her timbers hold together, though she may not have lost the form of a ship, yet she has ceased to exist for any useful purposes as a ship, and becomes a mere congeries of planks, the cost of repairing which, so as to restore to it its character as a sea-going ship, would exceed its worth when so repaired, this is a case of absolute total loss on ship, for which the assured may recover without notice of abandonment.

The authority of *Cambridge v. Anderton* doubted by Ch. J. Tindal, in *Roux v. Salvador*, 1 Bingham, N. C. 539-544.

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In the case of *Roux v. Salvador* (the facts of which we shall have to consider in the next article,) when it first came before the Court of Common Pleas, Mr. Chief J. Tindal dissented from the doctrine of the case of *Cambridge v. Anderton* as opposed to the weight of previous authorities, *especially to the two *Nisi Prius* decisions of *Allwood v. Henckell* and *Hodgson v. Blackiston*, which he regarded as laying down the proposition, without any limitation, that a notice of abandonment is necessary, though ship and cargo have been sold and converted into money, at the time when the notice of loss is received. (k)

Cases of *Hodgson v. Blackiston* and *Allwood v. Henckell*, considered.

These cases, however, only show that the mere fact of sale abroad, *irrespective of the state of the ship or cargo which led*

(i) *Gardner v. Salvador*, 1 Mood. & Rob. 116, in *Tanner v. Bennett*, Ry. & Mood. 192: and also in *Underwood v. Robertson*, 4 Camp. 138, where a total loss was claimed on sale of ship abroad, no notice of abandonment appears to have been given, and no objection made to the want of it.

v. Dallas, 1 Mood. & Rob. 48. *Allen v. Sugrue*, Dans. & Ll. 188, 8 B. & Cr. 561. See also the dicta of Ch. J. Dallas in *Idle v. Royal Exch. Ass. Comp.* 3 Moore, 148, 8 Taunt. 774.

(k) See judgment of Tindal Ch. J. in *Roux v. Salvador*, 1 Bingham, N. C. 539-544.

(j) It makes no difference which. *Doyle*

to and justified it, does not constitute an absolute total loss, though the assured may receive intelligence at one and the same time of the loss and the sale. In the case of *Hodgson v. Blackiston* (l) no facts are stated at all, but merely the principle laid down without any qualification. In *Allwood v. Henckell* (m) the facts were, that a ship, with cargo, insured for a homeward voyage from Jamaica to London, having been captured by the French and recaptured, was carried into Antigua by the recaptors, and there sold, under a vice-admiralty decree, by a prize agent, who held the proceeds for those concerned, subject to the recaptors' salvage; the assured, who received news of the loss and of the sale at the same time, at first elected to take to the proceeds, but subsequently gave notice of abandonment, which, being out of time, was treated as a nullity, and then brought his action for a total loss: it was contended that, as in this case, *the property had been sold and converted into money before the parties knew where the ship was taken to, the loss was absolutely total in its nature*, and no notice of abandonment was necessary. Lord Kenyon, though he gave no decided opinion on the point, *inclined to think that the case was the same as if the property had remained in specie at Antigua, and had not been sold*; and the verdict was ultimately taken for an average loss. (n)

Absolute total loss of ship in cases of wreck, or irreparability followed by sale.

Allwood v. Henckell, Park, 399, 8th ed.

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*It is clear that this case, when its facts are looked to, is no authority against the doctrine of *Cambridge v. Anderton*: here nothing is stated with regard to the state of damage to which the property was reduced; for any thing that appears to the contrary, the sale was wholly unjustifiable: the ship might have been, and in all probability was, subsisting in specie as a ship; though part of the cargo was plundered, the rest, for all that appears to the contrary, might have been forwarded: *the case, in fact, merely shows that there is no such head in insurance law as loss by sale*; in other words, that the mere fact of sale abroad, before notice of loss received, does not dispense with notice of abandonment, where the state of circumstances, at the time of sale, was not such as to have entitled the assured to recover for a total loss without such

These cases not inconsistent with *Cambridge v. Anderton*.

(l) *Hodgson v. Blackiston*, Park on Ins. 499, note, 8th ed. Marsh. on Ins. 611. (m) *Allwood v. Henckell*, Park on Ins. 399, 8th ed. (n) *Ibid.*

Absolute total loss of ship in cases of wreck, or irreparability followed by sale.

Doctrine of *Cambridge v. Anderton* recognized and reaffirmed by the Court of Exchequer Chamber in *Roux v. Salvador*, 3 Bingh. N. C. 266.

Where, however, ship subsists in specie, as a ship, when assured first receives notice of loss, he cannot, by electing to sell instead of repairing, entitle himself to claim a total loss without notice of abandonment.

Martin v. Crokatt, 14 East, 465.

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Reason why notice of abandonment should be given in such case.

notice ; accordingly, Lord Abinger, in delivering the judgment of the Court of Exchequer Chamber, in *Roux v. Salvador*, which, as to this point, reversed that of the Court of Common Pleas, expressly upheld the authority of *Cambridge v. Anderton*, which must now, therefore, be taken as undoubted law. (o)

§ 367. In *Cambridge v. Anderton* the ship, for all practical purposes, had ceased to exist as a ship when sold, and the sale was effected by the master abroad, without communicating with the assured, who received intelligence at one and the same time of the loss and the sale : where this is not so, but the ship, *though much damaged, is still subsisting as a ship when the assured receives intelligence of the loss*, he cannot, by electing to sell, instead of repairing, her, on the probable estimate of the expenses of repair being greater than her repaired value, entitle himself to recover a total loss without notice of abandonment : this is shown by the following cases : —

A ship and cargo being insured from Carlsrona (in Sweden) to London, the ship, in the course of her voyage, became so sea-damaged that she was forced to run into Warburg, a *small fishing place on the Swedish coast, where, on survey, she was reported incapable of proceeding on her voyage without thorough and very expensive repair. The assured, on hearing this, *without giving any notice of abandonment*, stated the facts to the underwriters, asking directions how to proceed ; they declining to interfere, he ordered a sale of the ship and cargo (*which latter was undamaged*) for the benefit of all concerned : they were accordingly sold on the spot, and realized so little that, after deducting the expenses of the sale and salvage, a balance of 20*l.* was left against the assured : the assured on this, having brought his action for a total loss, Lord Ellenborough directed a nonsuit, on the ground that, as the ship continued to subsist in specie in the place whither she was carried, this was not a total loss without notice of abandonment. On motion for a new trial, the court refused the rule (p) : Mr. J. Bayley said, the ship *remained all the time in the character of a ship*, when the owners proceeded

(o) 3 Bingh. N. C. 266, 4 Scott, 1.

(p) *Martin v. Crokatt*, 14 East, 465.

to the sale of her without giving notice of abandonment; and Lord Ellenborough said, "*Where the thing subsists in specie, as it did here, I cannot but say that an abandonment is necessary;*" and his lordship then states the reason why notice of abandonment ought in such cases to be given, viz. "*in order to enable the underwriters to elect whether or not they will incur the expenses of repair.*" (q)

Absolute total loss of ship in cases of wreck, or irreparability followed by sale.

A ship, after sailing seaworthy on her voyage from Hull to Quebec, was overtaken by bad weather, and obliged to run into Limerick, which then had no docks fit for taking in or repairing a ship of her size. On survey, she appeared much damaged, and, as the agent of the assured there conceived it to be impossible to remove her to any other port for repairs, they had her resurveyed, condemned, and broken up where she lay, as the best course for all concerned. No notice of abandonment having been given, it was held that the assured could not recover as for a total loss. (r) Dallas, C. J., after admitting that there were cases in which the assured may claim a total loss without abandonment, added, "*But if the case be doubtful, the assured ought not to take upon himself to determine for the underwriter, to break up the ship, and call upon them for a total loss. The ship is proved to have been in that condition, that it was necessary to have a survey. She was not a wreck; her timbers were together; she existed as a ship specifically, both when she was surveyed and when she was sold.*" (s)

Bell v. Nixon, Holt's Rep. 423.

* 1018

Mr. Phillips (t), remarking on this case, observes, "The formal abandonment of a ship that has been broken up, and the pieces sold as mere materials or fuel, seems about as idle ceremony as can be well conceived." But the decision seems correct in principle, when the circumstances of the case are attended to: *the ship remained a ship till broken up by the assured*; her destruction as a ship was, therefore, not immediately caused by the perils insured against; it was the work, not of the winds and waves, but of the assured himself, who ought, by notice of abandonment, to have given the under-

Remarks on the case of Bell v. Nixon.

(q) Ibid. 467.

notice of abandonment was necessary in this case.

(r) Bell v. Nixon, Holt's N. Pr. 423. The court in banc were unanimous, that

(s) Bell v. Nixon, Holt's N. Pr. 425.

(t) 2 Phillips, on Ins. 234.

Absolute total loss of ship in cases of wreck, or irreparability followed by sale.

writers the option of taking to the ship as she stood before being broken up, and making what they could of her.

The position, in fact, established by this and the preceding case simply is, that if the ship at the time of loss, notice of loss and sale, continues to subsist specifically as a ship, the assured cannot, on any probable estimate of its not being worth while to repair, proceed, without giving notice of abandonment, to have her sold or broken up, and then call upon the underwriters for a total loss.

If, however, he have given such notice, and then orders a sale, this will not, it seems, operate as a waiver of his notice; at all events, where the ship is as a ship wholly irreparable, except at a cost greater than her repaired value. (u)

Where, however, ship is a mere congeries of planks, assured by selling does not waive the right to insist on previous notice of abandonment.

§ 368. A question may be raised, whether, if the ship reach *her home port, or that of her destination*, in so shattered and *dismembered a state as to be no longer a ship, but a wreck, the assured may recover for a total loss without notice of abandonment: if she be wrecked in pieces off such port, so that nothing but her fragments come to hand, there can be no doubt that he may, and the wreck will then be a salvage for the benefit of the underwriters: if, however, her planks still hold together, so that she retains the shape of a ship, though wholly irreparable, so as to be fit to take the sea again, except at a cost greater than her value when repaired, the safer practice would appear to be, to give notice of abandonment: if that be done, the fact of her being brought thus disabled into her port of destination will make no difference to the right of the assured to claim a total loss. Thus, in *Shawe v. Felton*, where the ship had experienced a concussion at sea, which so disabled her, that, though her timbers held together, she was yet, to all practical purposes, a wreck, and could only be kept afloat in harbor by lashing her to another ship, the assured, who had given notice of abandonment, was held not precluded from recovering a total loss, because the port into which she had been so brought was her port of destination. (v)

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Can there be an absolute total loss on ship arriving a wreck at her port of destination?

If, in such case, her planks hold together, it is safer to give notice of abandonment.

Shawe v. Felton, 2 East, 108.

Allen v. Sugrue, 8 B. & Cr. 561.

So, *Allen v. Sugrue*, where the ship had got aground just off the entrance to her home port, and was afterwards brought

(u) *Allen v. Sugrue*, Dana. & Ll. 188. (v) *Shawe v. Felton*, 2 East, 108.

into that port in such a state that, though her timbers were together, she had still ceased to exist for any useful purpose as a ship, and was, in fact, a mere *congeries of planks*, which could only be restored to the character of a sea-going ship, at a cost which would have exceeded her value when repaired, the assured on notice of abandonment, was held entitled to recover a total loss (*w*): and the law as to this point is the same in the United States. (*x*)

Absolute total loss of ship in cases of wreck, or irreparability followed by sale.

Same law in the United States.

***SECT. III. Absolute Total Loss on Sea-damaged Goods when thrown away or sold in the course of the Voyage.**

* 1020

§ 369. Almost all perishable goods are insured in this country with a warranty to be "free of average," that is, as we have already seen, with a stipulation on the part of the underwriter that, in respect of such articles, he will be liable for nothing short of a total loss.

Absolute total loss on sea-damaged goods when thrown away or sold in the course of the voyage.

Hence, almost all the cases in which the question has been raised as to the underwriter's liability on articles warranted "free of average" have turned on the point, what, upon articles so insured, amounts to a total loss?

Almost all the cases of absolute total loss on goods have been cases of sea-damage to memorandum articles.

It is not, however, to be concluded on this account, that a total loss on articles warranted free of average is a different thing from a total loss on other perishable goods not so insured: the contrary is the case.¹

In all cases, in fact, except those of partial loss, the goods comprised in the memorandum stand on the same footing as other goods (*y*); if the question turns on the totality of the loss, there is no difference between them and other perishable

But where the question turns on the totality of the loss, all perishable goods, whether warranted "free of average" or not, stand on the same footing.

(*w*) *Allen v. Sugrue, Duns. & Ll. lirs on Ins.* 270. { But see *Pezant v. 188. S. C. 8 B. & Cr. 561, 3 Man. & National Ins. Co. 15 Wendell, 453, 458. Ryl. 9. Parage v. Dale, 3 John. Cas. 156. }*

(*x*) † *Ralston v. Union Ins. Comp. 4* (*y*) Per Bayley J. in *Hunt v. Royal Biney, 366. † Peters v. Phoenix Ins. Exch. Comp. See Benecké, Pr. of Indem. Comp. 3 Serg. & Rawle, 26, cited 2 Phil. 383.*

¹ See *Morean v. U. States Ins. Co. 1 Wheaton, 219; Richardson v. Maine Ins. Co. 6 Mass. 119; Le Roy v. Gouverneur, 1 John. Cas. 226; Maggrath v. Church, 1 Caines, Cas. 196; Poole v. Protection Ins. Co. 14 Conn. 47; 3 Kent, (5th ed.) 297.*

Absolute total loss on sea-damaged goods when thrown away or sold in the course of the voyage.

ble articles. (z) "Whether a loss be total or partial *in its nature* must depend on general principles. The memorandum does not vary the rules upon which a loss shall be partial or total: it does no more than preclude the indemnity for an ascertained partial loss." (a)¹

As, however, in practice almost all articles of a perishable nature are insured "free of average," and all the cases, since the introduction of the memorandum into our policies in 1749, have had reference to articles so insured, the inquiry as to what amounts to a total loss on perishable goods is practically an inquiry in what cases the underwriter is liable for any loss on *memorandum articles*,—the term by which *commodities warranted free of average by the common memorandum are familiarly known in insurance law.

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Two classes of cases:

1. Where loss takes place in the course of the voyage.
2. Where the goods arrive at their port of destination sea-damaged.

These cases may be divided into two classes: 1. Where the loss has taken place in the course of the voyage, so that the goods never, in fact, arrive at their port of destination at all; 2. Where the assured claims to recover in respect of sea damage on memorandum articles arriving in bulk at such port.

With regard to the former class of cases, to the consideration of which the present article is confined, the following may now be taken as the rule established by our recent jurisprudence.

Principle established by the cases, as to absolute total loss on perishable goods when sold, or thrown away in the course of the voyage.

If perishable goods which have been once sea-damaged in the course of the voyage are necessarily unshipped at some *intermediate port*, and there found, by reason of the previous sea-damage, to be reduced, either to such a state of *absolute putridity* that they cannot with safety be re-shipped into the same, or any other vessel, and are, consequently, then and there *thrown overboard*; or to such a state of *rapidly progressive decay* that, instead of being re-shipped and forwarded, they are *necessarily sold at the intermediate port*, from the certainty that, if sent on to their port of destination, their

(z) † Per Mr. J. Washington, in *Morean v. United States Ins. Comp.* 1 Wheaton 219, cited 2 Phillips on Ins. 494.

(a) Per Lord Abinger in *Roux v. Salvador*, 3 Bingh. N. C. 277, 278.

¹ See *Poole v. Protection Ins. Co.* 14 Conn. 47.

species itself would disappear, their form become changed, and their original character be entirely lost by decomposition before arriving there — in such cases there is an absolute total loss, within the meaning of the policy, on the goods so thrown away or sold: even though at such forced termination of the risk (*i. e.* at the time of the sale or throwing overboard) the goods may still have subsisted in specie, this will make no difference; the assured is equally entitled to recover the whole amount of the insurance without giving any notice of abandonment, leaving to the underwriters the benefit of any salvage that may ultimately come to hand, in the shape either of the remains of the goods, or the proceeds of their sale. (b) ¹

Absolute total loss on sea-damaged goods when thrown away or sold in the course of the voyage.

*The rule thus established is opposed to that laid down by Lord Mansfield in the case of *Cocking v. Fraser*, which applied the more rigorous construction that *nothing short of going to the bottom of the sea (or, in his lordship's own words, "absolute destruction of the goods by the wreck of the ship,")* could amount to a total loss on articles insured "free of average," even at an intermediate port.

* 1022

This rule opposed to that of *Cocking v. Fraser*.

The facts of the case were as follows: fish was insured *free of average* from *Newfoundland* to the ship's port or ports of discharge in Portugal: the Portuguese port for which the cargo was destined was *Figueira*. The ship on her voyage encountered such bad weather that part of the fish was

Facts of the case of *Cocking v. Fraser*, 4 Dougl. 295.

(b) *Dyson v. Rowcroft*, 3 Bos. & Pull. 3 Bingham N. C. 266, 4 Scott, 1, *overruling*, 474. *Cologan v. London Ass. Comp.* 5 as to this point, S. C. 1 Bingham N. C. 324, *Mauls & Sel.* 447, *overruling Cocking v. Fraser*, 4 Dougl. 295. *Roux v. Salvador*,

¹ In *Poole v. Protection Ins. Co.* 14 Conn. 47, it was held, that, to subject the insurers for the loss of goods specified in the memorandum clause, it is not necessary that there should be either an actual destruction of every part of the goods insured, so as no longer physically to exist in specie, nor that there should be a total extinction of their value; but it is sufficient, if, by any of the perils insured against, the voyage is arrested, and the goods neither come to the hands of the owners, nor reach their port of destination, nor are capable of being forwarded. 3 Kent, (5th ed.) 297; *Treadwell v. Union Ins. Co.* 6 Cowen, 270. If the vessel is injured, during her voyage, to half her value, and no other vessel can be found to carry on her cargo to her port of destination, or, if the vessel, though capable of repair, cannot be repaired within a reasonable time, and before the cargo, being of a perishable nature, within the memorandum clause, will be irretrievably destroyed by the delay to repair, in such a case the insured may abandon the cargo, and recover for a total loss. *Robinson v. Commonwealth Ins. Co.* 3 Sumner, 220, 224; *Patapeco Ins. Co. v. Southgate*, 5 Peters, (S. C.) 604; 3 Kent, (5th ed.) 297. See *Maggrath v. Church*, 1 Caines, Rep. 214.

Absolute total loss on sea-damaged goods when thrown away or sold in the course of the voyage.

necessarily thrown overboard, and she was obliged, though bound for *Figueira*, to put into Lisbon, where, upon survey by the board of health of that city, the remainder of the fish was pronounced to be, and, in fact, was rendered, *of no value*, through sea-damage. The ship did not proceed from Lisbon to *Figueira* in completion of her destined voyage, and the fish was not forwarded. Lord Mansfield, under these circumstances, held that the loss was not actually total, and that, therefore, the assured on fish could recover nothing. (c)

"What," said his lordship, "is a total loss? A total loss of the thing insured is *the absolute destruction of it by the wreck of the ship*. The fish may all come to port, though, from the nature of the commodity, it may be putrid, it may be stinking, *still, as the commodity specifically remains*, the underwriter is discharged."

Cocking v. Fraser is overruled in English law.

It seems better to consider this case as overruled in English law, than to endeavor to support it upon its facts (d): especially since the language of Lord Mansfield is so entirely unambiguous and so undoubtedly opposed to the rule now understood to prevail. It was indeed dissented *from on three several occasions by Lord Kenyon (e), Lord Alvanley (f), and Lord Ellenborough (g); the latter of whom expressly said that, "if obliged to choose between the two, he should incline to the opinion of Lord Alvanley in *Dyson v. Rowcroft*, in preference to that of Lord Mansfield in *Cocking v. Fraser*."

1023 *

But supported to its full extent in the United States.

In the United States the case of *Cocking v. Fraser* is supported to its fullest extent; and the rule prevailing on this subject on the other side of the Atlantic is stated by Chancellor Kent to be, that the assured is secure against all damage on perishable articles within the memorandum, whether such damage be great or small, whether it defeats the voyage, or

(c) *Cocking v. Fraser*, Park, 8th ed. 247. Marshall, 227. Benecké, Pr. of Indem. 270. See also the case reported, 4 Dougl. 295.

(d) Lord Alvanley conjectures that the words "of no value," in the case of *Cocking v. Fraser*, are somewhat too large, and that the fact was, not that the cargo was in such a situation as to make it impossible to preserve it, but was only

so much damaged as not to be worth carrying on to the port of destination." See *Dyson v. Rowcroft*, 3 Bos. & Pull. 476.

(e) In *Barnett v. Kennington*, 7 T. Rep. 222.

(f) *Dyson v. Rowcroft*, 3 Bos. & Pull. 475, 476.

(g) In *Cologan v. London Ass. Comp.* 5 Maule & Sel. 455.

only diminishes the value of the goods, unless the article be completely and actually destroyed so as no longer physically to exist. (h) ¹

Absolute total loss on sea-damaged goods when thrown away or sold in the course of the voyage.

In our own jurisprudence, on the contrary, as the following cases show, there has been an uniform tendency to relax the extreme rigor of the rule laid down by Lord Mansfield, as far as relates to losses occurring in the course of the voyage.

A cargo of fruit was insured, "free of average," from Cadiz to Lisbon. The ship, in the course of the voyage, was forced, by tempestuous weather and contrary winds, into Santa Cruz, (an intermediate port,) where the fruit was found to have been so much damaged by sea water, that it had become rotten, and stunk to such a degree that the government there prohibited its being landed. It being requisite to unload the cargo in order to repair the ship; and, also, inconsistent with due regard to the health of the crew to keep it on board; it was necessarily thrown into the sea. The ship, on survey, was found so damaged as to be unable to proceed on the voyage, and was, therefore, sold at Santa Cruz. The Court of Common Pleas held that the assured might recover for a total loss without giving notice of abandonment. (i) Lord Alvanley said, "in this case it is found that the necessity" (for throwing the cargo overboard) "arose from sea water shipped during the course of the voyage, and that the commodity was in such a state that it could not be suffered to remain on board consistently with the health of the crew. In consequence of this necessity, therefore, the commodity was annihilated by being thrown overboard. Had it not been so annihilated, it would have been annihilated by putrefaction; and is it not as much lost to

Fruit, insured "free of average," is thrown overboard, being rotten, at an intermediate port: held an absolute total loss. *Dyson v. Rowcroft*, 3 Bos. & Pull. 474.

* 1024

"Annihilation by putrefaction" is an absolute total loss.

The memorandum does not exempt the underwriters from all loss on perishable articles short of, their total annihilation.

(A) 3 Kent's Comm. (5th ed.) 295. See also *Salut v. Ocean Ins. Comp.* 14 John. 136. *Moreau v. United States Ins. Comp.* 3 Wash. C. C. 250. See particularly 2 Phillips on Ins. 482, 486. If the words "physically exist," in the rule as above laid down by Chancellor Kent, have the

same meaning as they bear on this side the Atlantic, there seems to be very little difference between the rule of law in the two countries.

(i) *Dyson v. Rowcroft*, 3 Bos. & Pull. 474.

¹ See *Hugg v. Augusta Ins. & Banking Co.* 7 Howard, (U. S.) 595, cited *post*, 1030, in notes; *Poole v. Protection Ins. Co.* 14 Conn. 47, cited *ante*, 1021, in note; *Neilson v. Columbian Ins. Co.* 3 Calnes, Rep. 108; *Marcadier v. Chesapeake Ins. Co.* 8 Cranch, 30; *Skinner v. Western M. & F. Ins. Co.* 19 Louis. 273; *Magrath v. Church*, 1 Calnes, 196.

Absolute total loss on sea-damaged goods when thrown away or sold in the course of the voyage.

Part of cargo of wheat insured "free of average," thrown away as putrid at an intermediate port; *semble*, an absolute total loss of such part. *Cologan v. London Ass. Comp. 5 M. & Sel. 447.*

1025 *

Remarks of Ellenborough on the general question.

Position established by Roux p. Salvador.

the insured by being thrown overboard, as though the captain had waited till it arrived at complete putrefaction?" — "*I never have understood that the underwriters insure fish and other articles against no perils which do not end in a total annihilation of the commodity.*" (j)

In the next case, a cargo of wheat was insured, "warranted free of average," on a voyage from Quebec to Teneriffe; in the course of the voyage, the ship, having been captured and recaptured, was carried by the recaptors into Bermuda, where, a scarcity prevailing, an embargo was put on the wheat: it being also found necessary to repair the ship, and in order thereto to unload the cargo, an order was obtained from the government of Bermuda for that purpose, and the whole cargo was accordingly landed, except about 600 bushels of the wheat, which were found to be in such a state, from the sea water, that the magistrates, out of regard to the public health, would not suffer it to be landed, but ordered it to be destroyed. It was wholly unfit for use, and was accordingly carried outside the harbor and thrown into the sea: as to this part of the case, the Court of King's Bench intimated a strong opinion, (though, as notice of abandonment had, in fact, been given, the point did not directly arise for their decision,) that there was an absolute total loss on the wheat *thus thrown into the sea. Lord Ellenborough said, "considering the contract of insurance as a contract of indemnity, *it surely cannot be less a total loss because the commodity subsists in specie, if it subsist only in the form of a nuisance.*"¹ There is a total loss of the thing, if by any of the perils insured against *it is rendered of no use whatever, though it may not be entirely annihilated.*" (k)

The following case, which is now the leading authority on the subject in our jurisprudence, goes further, and shows, that if the goods thus necessarily landed at an intermediate port in a sea-damaged state, are sold in the market there, from the certainty, that, if reshipped and sent on to their port of destination, they will inevitably perish before arriving there,

(j) *Dyson v. Rowcroft*, 3 Bos. & Pull. Maule & Sel. 447, judgment of Lord Ellenborough, 454, 455.

(k) *Cologan v. London Ass. Comp. 5*

¹ See *Williams v. Cole*, 16 Maine, 207.

by the progress of putrefaction, which has already commenced, and cannot be arrested by any means within the master's disposal; in such case the assured, who receives intelligence at one and the same time of the loss and the sale, may recover as for a total loss, without notice of abandonment, although the goods at the time of sale, still subsisted in specie, and commanded a price in the markets of the intermediate port, as and for what they were described as being in the policy; it being always understood that the proceeds of the sale, when they come to hand, are *pro tanto* a salvage for the benefit of the underwriters.¹

Absolute total loss on sea-damaged goods when thrown away or sold in the course of the voyage.

Hides valued at 1117*l.* in the policy, were insured, "free of average," for a voyage from *Valparaiso* to *Bordeaux*. The ship, after sailing, sprung a leak, which obliged her to put into Rio de Janeiro, as the nearest port, to repair. There the whole cargo was *necessarily landed* in order to repair the ship, and the hides were found to be in a state of incipient putrefaction occasioned by moisture, which had got into the hold owing to the leak; they were all, as it is termed, "greased," the hair coming off in the fingers of those who handled them. This greasing is a partial fermentation, which could not be stopped by any means practicable at Rio; and, *in consequence of its progress, it became impossible to send the hides on with any hope of their reaching their port of destination in a *salable state as hides*: had it been attempted to carry them on they would, by the progress of putrefaction, have lost the character of hides before they arrived there. They were consequently sold at Rio for the gross sum of 273*l.*: they were sold *as hides*, for the purpose of being tanned, and were so tanned by the purchasers.

Roux v. Salvador, 3 Bingh. N. C. 266;
4 Scott, 1. overruling S. C. 1
Bingh. N. C. 324; 1 Scott, 491.

* 1026

The ship was subsequently repaired, and proceeded to *Bordeaux* with the rest of her cargo; the assured, who had received at the same time notice of the loss and the sale, brought his action as for a total loss, without having given any notice of abandonment; the Court of Exchequer Chamber reversing, as to this point, the judgment of the Court of Common Pleas, held that this was an absolute total loss on

¹ See *Hugg v. Augusta Ins. & Banking Co.* 7 Howard, (U. S.) 595, cited 1030, notes; *Poole v. Protection Ins. Co.* 14 Conn. 47, cited *ante*, 1021, in note.

Absolute total loss on sea-damaged goods when thrown away or sold in the course of the voyage.

Grounds of decision.

the hides so sold, for which the assured might recover without notice of abandonment. (*l*)

The principles upon which the Court of Exchequer Chamber proceeded in thus deciding have been already developed in a preceding article (*m*), and are admirably stated by Lord Abinger in giving the judgment of the court; a judgment which should be attentively studied by all who desire to know the present state of our law on this much litigated point. Without restating here what ought to be read at large in the report, it will be sufficient to say that the main point of decision was this, — that, owing to the perils insured against, it had become impossible, when notice of loss was first received, for either the assured or the underwriter to procure the arrival of the hides according to the terms of the policy.

Judgment of Lord Abinger.

“In the case before us,” said his lordship, “the jury have found that the hides were so far damaged by the perils of the sea, that they never could have arrived in the form of hides. *By the process of fermentation and putrefaction which had commenced, a total destruction of them before their arrival *at their port of destination, became as inevitable as if they had been cast into the sea or consumed by fire.* Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold; and *the facts of the loss and sale were made known at the same time to the assured.* Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us, therefore, that this was not the case of what has been called a *constructive total loss*, but of an *absolute total loss*, of the goods: they could never arrive; and, at the same moment when intelligence of the loss was received, all speculation was at an end.”

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His lordship then enters into the question, whether the fact of the goods, as in this case, subsisting in specie at the time of sale, and being in fact sold as hides, ought to make any difference as to the necessity of giving notice of abandonment; his lordship decides that notice of abandonment is no

(*l*) Roux v. Salvador, 3 Bingham N. C. 200, 4 Scott, 1, overruling as to this point, S. C. 1 Bingham N. C. 324, 1 Scott, 491.

(*m*) See *supra*, Art. 1.

more necessary in this case, than it would have been "if, instead of being sold in specie, the hides had actually changed their form and been sold as glue, manure, or ashes;" (n) in which case his lordship assumes it as an undoubted point, that no notice would be requisite. (o)

Absolute total loss on sea-damaged goods when thrown away or sold in the course of the voyage.

In either case such sale, when, in the opinion of the jury, justified by necessity and a due regard to the interests of all parties, is made for the benefit of the party who is to sustain the loss; and the net amount thereof, after deducting the charges, becomes money had and received to the use of the underwriter, upon payment by him of a total loss.

Net proceeds of sale are money had and received to the use of the underwriter on payment by him of a total loss.

* 1028

§ 362. It must, however, very carefully be borne in mind, that no degree of loss in bulk, deterioration in quality, or depreciation in value, will entitle the assured to put an end to the adventure, and recover a total loss WITHOUT NOTICE OF ABANDONMENT, on goods warranted free of average, unless such damage involves their total destruction in specie, either actual or inevitable. If the commodity can be forwarded to its port of destination with any reasonable prospect of arriving there in specie, however damaged, the assured who has failed to send it on, or sold it at an intermediate port, cannot recover as for a total loss, at all events, without notice of abandonment.¹

No degree of loss in bulk, deterioration in quality, or depreciation in value, will entitle the assured to put an end to the adventure, and recover a total loss, without abandonment, on memorandum articles, unless such damage involves their total destruction in specie, either actual or inevitable.

Wheat, valued at 1000*l.*, was insured, "free of average," from *Waterford* to *Liverpool*. The ship, on going down the river from *Waterford*, struck, and was run aground to prevent her sinking, in a place where her hull was completely under water at every high tide. The wheat, in the course of about a month after the ship's being stranded, was got out much damaged: one-third of it was thrown away as wholly useless; the other two-thirds were kiln-dried, and might have

Anderson v. Royal Exch. Comp. 7 East, 58.

(n) 3 Bingham, N. C. 292.

(o) Thus answering in the negative a case put by Mr. Benecké: "Suppose fish valued at 100*l.* to sell for 1*l.* as manure, will this be a value so as to exonerate the underwriter." *Pr. of Indem.* 379, note.

Chancellor Kent answers the same case also in the negative, "for the cargo was of no value as fish, or in contemplation of the contract." *Comm.* vol. iii. p. 296, note a. ed. 1844.

¹ See *Hugg v. Augusta Ins. & Banking Co.* 7 Howard, (U. S.) 595.

Absolute total loss on sea-damaged goods when thrown away or sold in the course of the voyage.

been sent on to Liverpool and sold there; instead of this, however, it was sold at *Waterford* for about 250*l.* gross, and 90*l.* net. Lord Ellenborough held, that in this case the assured could not recover for a total loss on the wheat without notice of abandonment, because it might have been sent on to its port of destination, in a salable state, as wheat. (*p*)

Thompson v. Royal Exch. Comp. 16 East, 214.

Tobacco and sugar were insured, "free of average," from Heligoland to London. Just off Heligoland the ship was wrecked, but the tobacco and sugar were got ashore there, and saved, though in a very damaged state; the sugars having been mostly washed out of the hogsheads, and the tobacco (according to the statement of the plaintiff's counsel) entirely spoiled by sea water, so as to be worth nothing at all to the assured. The Court of King's Bench unanimously held, that the assured, who had not abandoned, could not recover for a total loss. (*q*) Lord Abinger remarks on this case, that "the tobacco and sugar, though damaged by the sea, was in *the hands of the shippers at Heligoland; and, as stated by Lord Ellenborough in his judgment, for any thing that appeared, might have been forwarded to their port of destination." (*r*) Lord Abinger probably spoke from recollection of what had been said by Lord Ellenborough in his own hearing; for nothing of the kind appears in the printed report, which is, however, very brief.

Lord Abinger's remark on this case.

1029 *

Hedburgh v. Pearson, 7 Taunt. 153.

Fifty-four hogsheads of sugar were insured, "free of average," from *Gottenburgh to Stralsund*. At Copenhagen, in the course of the voyage the ship was stranded and bilged; every one of the fifty-four hogsheads was saved from the sea; and in every hogshead there were some loaves of sugar left, though the total quantity of sugar saved out of the whole fifty-four hogsheads was little more than enough to fill one: seventy of the loaves were saved dry. The Court of Common Pleas held that this was not an absolute total loss, and, therefore, that the underwriters were not liable. (*s*) The decision in this case was evidently conformable to the principle already stated; for although the sugars were greatly

(*p*) *Anderson v. Royal Exch. Comp.* 7 East, 58.

(*q*) *Thompson v. Royal Exch. Comp.* 16 East, 214.

(*r*) 3 Bingham, N. C. 260.

(*s*) *Hedburgh v. Pearson*, 7 Taunt. 153.

diminished in value and quantity, yet a portion of them was saved, in a salable state *as sugar*, and might, *as such*, have been sent on to its port of destination.

Absolute total loss on sea-damaged goods when thrown away or sold in the course of the voyage.

SECT. IV. *The Underwriter is never liable, as for a Total Loss, on sea-damaged Goods arriving in specie at their Port of Destination.*

§ 370. In the cases considered in the last article, the total loss, in respect of which the underwriters were held liable, on goods warranted "free of average" took place in consequence of a forced termination of the risk, by the perils insured against, *in the course of the voyage, i. e. before the arrival of the goods at their place of destination, according to the terms of the policy*: if, however, they do so arrive at their port of destination, Lord Abinger admits, and the following cases *show, that "if they remain in specie, however damaged, there is not a total loss," and, consequently, the underwriter who has stipulated by the memorandum to be liable on such goods only in case of a total loss, is exonerated, by the very terms of the policy, from all chargeability.¹

The underwriter is never liable, as for a total loss on sea-damaged goods arriving in specie at their port of destination.

If goods warranted free of average arrive in specie at their port of destination, however damaged, the underwriter is discharged.

* 1030

In a case, indeed, that was decided by Chief Justice Lee, at Nisi Prius, before the introduction of the memorandum into English policies, where perishable goods arrived at their port of destination so damaged by the perils of the sea, as to realize, on sale there, less than the freight, the Chief Justice was of opinion that this was a total loss, and the jury found accordingly. (t)

Case of Boyfield v. Brown, 2 Str. 1065, (which was before the introduction into policies of the memorandum clause) seems *contra*, but is overruled.

It is better to consider this case overruled, than to endeavor to reconcile it with the subsequent authorities, on the ground that the goods were not warranted free of average; for, as we have already seen, this warranty makes no difference when the question turns on the *totality* of the loss,² and the

(t) Boyfield v. Brown, 2 Str. 1065.

¹ In regard to the change in a thing so that it no longer exists *in specie*, it was held in New York that a chariot, insured free of average, did not specifically remain, after the loss of the box; for if the box should be replaced, Mr. Justice Benson said,—"it could not, with propriety, be said that the chariot was repaired; it would be a new chariot." *Judah v. Randal*, 2 Caines, Cas. 324.

² *Ans*, 1030.

The underwriter is never liable, as for a total loss, on sea-damaged goods arriving in specie at their port of destination.

true proposition is that, either with or without the warranty, there is no total loss if the goods, however damaged, arrive in specie; *the difference being that, if they are warranted free of average, the underwriter is released from his liability ALTOGETHER, whereas, if not so warranted, he would be liable as for an average loss, in proportion to the depreciation actually sustained by the sea-damage.*

1. English authorities.

1. There are numerous cases in which this point has been determined uniformly in the same way.

M'Andrews v. Vaughan, Park, 8th ed. 252.

Thus, where fruit was insured, "*free of average*," from *Lisbon to London*, and arrived at the latter place so damaged by the perils insured against as to have lost 80 per cent. in value, Lord Kenyon held the underwriters not to be liable. "The cargo," said his lordship, "arrives at its port of destination; and though it is good for very little, yet it has invariably been held that the voyage must either be lost, or the cargo, if it be one of those mentioned in the memorandum, be *wholly and actually destroyed*, to entitle the assured to recover." (u)

1031 *

*In this case it should seem that the fruit, though much damaged, was neither physically destroyed, nor totally extinguished in value: it was still fruit, and salable as such, though at a very reduced price.

Mason v. Skurray, Park, 8th ed. 253.

So, where a cargo of peas, warranted free of average, reached its port of destination so damaged as to produce only one fourth of the freight, which became due on their arrival, the defence set up was that, if the goods mentioned in the memorandum arrive in the market, (*i. e.* the market to which they are destined,) then, though a loss equivalent to a total loss may have happened on them, the underwriters are not liable. Upon this evidence the jury, under the direction of Lord Mansfield, found for the defendant. (v)

Here, again, the peas seem to have been sold *as peas*, and, therefore, were not totally extinguished, either in specie or in value.

Glennie v. London Ass. Comp. 2 Maule & Sel. 371.

Rice was insured, "*free from average*," from Charleston to Liverpool; the ship, after arriving within the limits of the port of Liverpool, took the ground while endeavoring to

(u) M'Andrews v. Vaughan, Park, 252, 8th ed.

(v) Mason v. Skurray, Park on Ins. 253, 8th ed. Marshall on Ins. 218, 219.

get into the dock gates there, filled with water, and became a wreck; the rice was taken out of her in small craft, as she lay, and sold in Liverpool for 972*l.*; the freight amounting to 1762*l.* This was held not to amount to a total loss on the rice. (w) Lord Ellenborough said, "I think it quite clear that this is a case of particular average, and not of total loss. There had been *an arrival of the ship with the goods at their destination*—the voyage has been performed, and the goods have come into the hands of the consignees; it appears that the rice, which was said to be totally lost, did produce 972*l.*" (x)

The underwriter is never liable, as for a total loss, on sea-damaged goods arriving in specie at their port of destination.

In this case, it is also clear that the rice subsisted as rice, and was sold as such, though at a great loss. "Though damaged," as Lord Abinger observes, "it was delivered to the consignees, and in a salable state as rice." (y)

Remarks of Lord Abinger on this case.

*In the case last cited, reference was made to an unreported decision of Buller v. Christie, in order to prove that, if the ship be wrecked before reaching her port of destination, but the goods are saved so as to reach the hands of the consignees in a damaged, but not an unsalable, state, there is a total loss thereon, by reason of the wreck of the ship. The facts of the case referred to were these: 1950 boxes of soap were insured (not stated to be free of average) from Liverpool to Oporto. The ship was wrecked just outside the bar of Oporto; all the boxes, except seventeen, were got ashore, and came to the hands of the consignees, having sustained damage not exceeding 20 per cent. There was no abandonment, but Lord Ellenborough held the loss to be total. (z)

*1032

Buller v. Christie, cited in Maule & Sel. 374.

This case seems opposed to a variety of other decisions, and, on principle, cannot be supported. What has the wreck of the ship to do with the question, whether there is or is not an actual total loss on the goods? The underwriter does not insure the arrival of the goods *in the ship*; otherwise whenever the ship is lost on the voyage there would be an actual total loss on the goods, which is not so. It is opposed to other English authorities. Thus, in Davy v. Milford (a), the ship was wrecked before arrival, and yet the loss was held only

Remarks on this case.

(w) *Glennie v. London Ass. Comp.* 2 Maule & Sel. 371.

(y) In 3 Bingham N. C. 290.

(z) *Glennie v. London Ass. Comp.* 2 Maule & Sel. 376.

(x) Buller v. Christie, cited in 2 Maule & Sel. 374.

(a) 15 East, 530.

The underwriter is never liable, as for a total loss, on sea-damaged goods arriving in specie at their port of destination.

to be a particular average loss on the flax washed ashore; in *Hedburgh v. Pearson* (b), and *Thompson v. Royal Exch. Co. (c)*, the wreck took place before arrival, yet the loss was held only partial on the goods washed ashore: and yet in all these cases the damage to the goods saved far exceeded 20 per cent., which was the extent of damage in *Buller v. Christie*; if it be urged that, in *Buller v. Christie*, the soap was not a memorandum article, that, we have already seen, makes no difference in cases where, as in *Buller v. Christie*, the only question is, whether the loss was, or was *not, actually total*: on the whole, therefore, the case seems alike unsupported by principle and by authority; and the position it was adduced to establish must be abandoned. (d)

1033 *

2. Law in the United States as to total loss on perishable articles arriving at their port of destination in specie.

2. The decisions of the American courts, upon the general principle that nothing short of absolute destruction will make a total loss on memorandum articles, if they arrive at their port of destination, are to the same effect, or even stronger than our own. Thus, where corn, insured "free of average," arrived in a putrid state at its port of destination, the judge at Nisi Prius told the jury "that if it was so much damaged as to have become of no value for the nutriment of man," the underwriters were liable as for an actual total loss.

But the court in *Banc* held this a misdirection, saying, "that so long as the corn physically existed there could not be a total loss on account of damage merely; although it was good for nothing, the insurers were not liable, (e)¹

(b) 7 Taunt. 153.

(c) 16 East, 214.

(d) It is opposed, almost in terms, by the following decision in the United States. Insurance on corn, "free of average," from Cape Henry to Lisbon. The ship was wrecked just outside Lisbon harbor, a portion of the corn was kiln dried, and

sold in Lisbon for little more than the expenses of saving and drying: held not a total loss. † *Morean v. United States Ins. Comp.* 3 Wash. C. C. 250, cited in 2 Phillips, on Ins. 484.

(e) † *Neilson v. Columbian Ins. Comp.* 3 Caines, 106, cited in 2 Phillips on Ins. 483.

¹ *Robinson v. Commonwealth Ins. Co.* 3 Sumner, 220, 224; *Marcadier v. Chesapeake Ins. Co.* 8 Cranch, 20; *Morean v. Chesapeake Ins. Co.* 1 Wheaton, 219; 3 Kent, (5th ed.) 295 to 297; *Skinner v. Western M. & F. Ins. Co.* 19 Louis. R. 273; *Ins. Co. v. Bland*, 9 Dana, 143; *Morean v. U. S. Ins. Co.* 1 Wheaton, 219; S. C. 3 Wheaton, 256. In *Williams v. Cole*, 16 Maine, 207, the insurance was on potatoes, which came within the exception of the memorandum clause in the policy. The court said;—"Here, the cargo was so damaged by the perils of the sea, as to exist only in the shape of a nuisance. In such a case, the loss is total without aban-

3. In France, before the introduction of the new code, when actual total loss (*perte entière*) was by the Ordinance de la Marine, made a ground of abandonment on perishable goods, (*f*) the question was vehemently debated, whether such a case of actual total loss could ever be said to arise when the goods arrived in specie at their port of destination. Emerigon was decidedly of opinion that it could not. "I have already spoken," he says, "of the case in which a cargo of wheat arrives in port almost entirely rotten (*presque tout pourri*;) I now add that even if it arrive entirely so (*quand même il le serait en entier*;) that is not such a case of total loss as to justify an abandonment." (*g*) *Valin (*h*) and Pothier (*i*) inclined to the less rigorous interpretation; and the latter even considered that the loss might be total within the meaning of the 46th article of the Ordinance, if the goods were damaged to half their value.

The underwriter is never liable, as for a total loss, on sea-damaged goods arriving in specie at their port of destination.

3. Law of France on the subject.

Opinion of Emerigon.

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Of Valin and Pothier.

The French tribunals, before the Code de Commerce became the law of the land, were frequently called upon to decide between these conflicting authorities; and they appear invariably to have supported the more rigid construction of Emerigon, and uniformly to have upheld the doctrine, that there can be no total loss on perishable goods unless there have been an entire privation, or *absolute destruction of them in their nature and essence* (*destruction totale des effets assurés dans leur nature et essence*.) (*j*)

French jurisprudence before the Code de Commerce.

From a review of all these authorities, it plainly appears that no degree of damage, however great, can amount to an

Result of the cases.

(*f*) Ord. de la Marine, tit. vi. des Ass. art. 46.

(*g*) Emerigon, chap. xvii. sect. 2, vol. ii. p. 214, ed 1827. M. Estrangin dissents from this opinion. "This doctrine," he says, "is at variance with what Emerigon himself has advanced a little before, viz. that a thing is destroyed when it has ceased to exist in specie." (*Quand elle cesse d'exister en essence*, see Emerigon, ibid. 213.) He adds, "if wheat has become manure it certainly can no longer

be said to exist in specie." (Si le blé est devenu fumier il n'est certainement plus dans son essence.) Estrangin, note to Pothier, Traité d'Assurance, p. 428, ed. 1010.

(*h*) Comment. on Ord. tit. vi. art. 46, vol. ii. p. 342, ed. 1829.

(*i*) Pothier, Traité d'Assurance, No. 121.

(*j*) See Estrangin's edition of Pothier, in Appendix, pp. 419-429, ed. 1810.

document." So, the insured was permitted to recover for a total loss of cargo within the memorandum clause, although a few articles were saved at an expense not justified by their value, in *Bryan v. Ina. Co.* 26 Wendell, 617.

The underwriter is never liable, as for a total loss, on sea-damaged goods arriving in specie at their port of destination.

absolute total loss on perishable goods warranted free of average, if they *arrive in specie* at their port of destination: in other words, the mere fact of their so arriving precludes all inquiry into the extent of the damage they have sustained, and entirely discharges the underwriter, who has stipulated by the memorandum to be exempt from liability for any loss on such goods, which is not in its nature total.

If, however, the goods arrive at their port of destination in bulk, but so damaged as no longer to preserve their original character, is this an absolute total loss within the policy?

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On theory, it appears that the loss in such cases should be considered absolutely total.

§ 371. The question, however, may still be raised, whether, if the goods arrive at their port of destination, *but not in specie*, this will amount to an absolute total loss, so as to charge the underwriter, notwithstanding the memorandum. If the goods, or rather the remains of such goods, arrive at their port of destination in such a state that, in the language of Lord Abinger, "the species itself has disappeared, and the goods have assumed a new form, losing all their original character,"¹ — if, in fact, they arrive, in the words of Lord Alvanley, "*annihilated by putrefaction*" — may not the loss on such goods be considered total notwithstanding their arrival? It is an absolute total loss, for which the underwriter is liable, notwithstanding the memorandum, if I sell my hides at Rio Janeiro, from the certainty that, if sent on to Bourdeaux, they will arrive there a mere mass of putrefaction; if, instead of selling, I send them on, and they *do* arrive at Bourdeaux a mere mass of putrefaction, surely their so arriving cannot prevent the loss from being actually total, so as to exempt the underwriter from his liability? That of which I insure the arrival is a cargo of *hides*; that which actually comes to port, in the case supposed, is a *heap of corruption*, which cannot properly be designated as hides, nor be sold as such: the actual thing, then, whose arrival I insured has not come to port: it is physically destroyed — "*annihilated by putrefaction*" — is the loss less an actual total loss because the remains of the thing insured have not been thrown overboard or burnt before arrival?²

These reasonings are plausible, and, in fact, theoretically speaking, seem to be unanswerable; but in practice it appears

But it has never been decided so to be; and for all practical purposes it appears better to consider it not an actual total loss.

¹ See *Judah v. Randal*, 2 Caines, Cas. 394.

² See 3 Kent, (5th ed.) 296, 297; *ante*, 1033, in note.

far better to disregard all such refinements, and to lay down the broad position that there can be no total loss on perishable goods, and, therefore, no claim whatever against the underwriter, who, by the memorandum, has expressly confined his liability to the case of their total loss only, unless the goods either go to the bottom of the sea, or are necessarily destroyed or justifiably sold by the assured, from the impossibility of sending them on in specie to their port of destination.¹

The underwriter is never liable, as for a total loss, on sea-damaged goods arriving in specie at their port of destination.

If the goods, or their remains, once arrive at the port of destination in bulk, so that freight is payable on them, then no matter how damaged, no matter if even physically destroyed, the underwriter, who has protected himself from liability by the memorandum, should be entirely released from all claim for indemnity.

To introduce the question of the physical destruction of *the goods in such cases as a test of the underwriter's liability, would lead in practice to infinite difficulty and embarrassment. It is impossible to define beforehand in what the physical destruction of any class of perishable goods consists: what might appear to amount to a case of physical destruction to one jury, might be differently regarded by another: and uncertainty and confusion would thus be introduced into a subject which ought to be rendered as certain as possible. In fact, as Emerigon says, with reference to this very point, to introduce such a test would be to make the question of the underwriter's liability "depend on the fluctuating views which different men might form on the same subject, and could be of no service except to give rise to litigation ruinous to commerce." (*k*)

The test of destruction in specie is of very difficult practical application.

* 1036

It was an admirable maxim of Lord Mansfield's, which ought never to be lost sight of in the determination of any doubtful point of mercantile law, — "That the property and daily negotiations of merchants ought not to depend on

(*k*) Emerigon, chap. xvii. sect. 2, vol. ii. p. 214, ed. 1827.

¹ A sale of the cargo, by the master, rendered necessary by the operation of the perils insured against upon the cargo itself, is undoubtedly a total loss of the cargo, no less than a sale of the ship is, under similar circumstances, a total loss of the ship. See ante, 1011, and in note.

The underwriter is never liable, as for a total loss, on sea-damaged goods arriving in specie at their port of destination.

Modern French law on this point.

Code de Commerce, Art. 369.

Explained by M. Pardessus.

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Remarks of M. Becane on this change of the law.

French rule with regard to memorandum articles.

Code de Commerce, art. 409.

The assured may, by electing to abandon, recover upon memorandum articles as well as upon any others, when the loss exceeds three fourths in measure, weight, or value.

subtleties and niceties, but on rules easily learned and easily retained, because they are the dictates of common sense." (l)

It was, no doubt, from the influence of such principles, that the legislature of France, on introducing the new commercial code, altered the clause in the Ordinance de la Marine which made "actual total loss" (*perte entière*) a ground of abandonment on perishable goods, and substituted instead thereof the words "loss or deterioration of the commodities insured when such deterioration or loss amounts to three-fourths." (m)

M. Pardessus thus explains this provision: "The term *loss* (*perte*) relates to the *quantity*; *deterioration* to the *quality* of the thing insured. The quantity lost is ascertained by measure and weight: deterioration is the change of a good into a bad quality of the same article, which may happen without any diminution of its quantity, and is estimated in its value." (n)

*The last editor of Valin, Monsieur Becane, writing in 1828, *i. e.* more than twenty years after the code became the law of France, thus speaks of the change introduced by it in this respect: "Nothing can be more just than such a regulation: a deterioration so considerable is equivalent to a total loss; and, but for this rule, as an actual total loss (*perte entière*) can hardly occur except in cases of shipwreck, the underwriters might frequently have raised difficulties which the law has wisely put an end to by a safe and definite rule." (o)

With regard to memorandum articles it is expressly provided, by the Code de Commerce (p), "That the clause *free of average* shall discharge the underwriters from all liabilities from average losses, whether general or particular, *except in those cases which give a right of abandonment*; and in such cases the assured may choose whether he will abandon, or proceed for an average loss."

As damage to the goods in quantity or quality to the extent of three fourths in measure, weight or value, is, as we have seen, one of the express grounds of abandonment, it

(l) 2 Burr. 686.

(m) Art. 369. "Perte ou deterioration des effets assurés, si la deterioration ou perte vu au moins à trois quarts."

(n) Pardessus, Cours de Droit Comm.

vol. iii. part iv. tit. 5. No. 845. p. 401. ed. 1841.

(o) Valin, Comment. sur Ord. ed. par M. Becane, 1828, vol. ii. p. 339.

(p) Code de Commerce, art. 409.

follows that the assured may, by the present law of France upon abandonment, recover for a total loss on memorandum articles as well as upon any others, whenever the loss or deterioration reaches the required amount.

The underwriter is never liable, as for a total loss, on sea-damaged goods arriving in specie at their port of destination.

If, indeed, he does not avail himself of his right of abandonment, he is then left to the operation of the old law, which, as we have seen, is upon this point exactly the same as our own. (q)

It certainly appears very desirable that some such rule should be adopted in our own law; for the present system, as the reports sufficiently prove, has given rise to great difficulties, and introduced a subtlety and refinement of distinction which seems entirely out of place in a law assuming to regulate the practical dealings of practical men.

French system on this point seems preferable to our own.

*SECT. V. *Absolute Total Loss of Part of Cargo.*

*1038

§ 372. It is an undoubted doctrine in the English law of marine insurance, that, if a cargo of perishable goods be made up of several distinct packages, each capable of a separate valuation, and one, or more, of these be entirely lost, there is an absolute total loss upon every such package, though the rest of the cargo may come to hand only partially damaged, and the whole may have consisted of articles warranted free from average.

Absolute total loss of part of cargo.

If a cargo of perishable goods be made up of several distinct packages, each capable of distinct valuation, and any one of these be entirely destroyed, or go to the bottom of the sea, that is an actual total loss of part.

The foundation of this doctrine, in English law, appears to be the following passage from Lord Mansfield's judgment in *Lewis v. Rucker* (r): "If part of the cargo, capable of a distinct and separate valuation in the outset, be totally lost — as, if there be 100 hogsheads of sugar, and 10 happen to be lost — the insurer must pay the prime cost of those 10 hogsheads, without regard to the price at which the other 90 may be sold."

If the cargo be thus made up of separate packages, capable of distinct valuation in the outset, and the insurance appears, from the terms of the policy, to be separately effected on each

(q) Boulay-Paty, *Comment. on Emerigon*, chap. xii. sect. 46. vol. ii. p. 19. ed. 1827.

(r) 3 Burr. 1176.

Absolute total loss of part of cargo.

In practice clauses are almost always inserted in policies on perishable goods, to show that the insurance is to be thus distributively taken; and this is so much a matter of usage, that, even where not inserted, the policy in practice is acted on as though they were.

* 1039

Actual total loss of part of flax packed in mats. *Davy v. Milford*, 15 East, 559.

distinct package, there can be no doubt that the loss will be treated as a total loss on each package lost. (s)

In practice, accordingly, as we have seen elsewhere, clauses are inserted in almost all policies upon perishable cargoes composed of separate packages, which have the effect of showing that the insurance is to be thus distributively taken: thus where the cargo consists of manufactured goods, shipped in bales or boxes, a clause is generally inserted "*to pay average on each package as if separately insured*;"—where it consists of different kinds of raw produce, "*to pay average on each species as if separately insured*" (t); and this is said to be considered so much a matter of usage where goods are insured direct from their place of growth or manufacture, that even if no such clauses are inserted in the policy, yet a liberal construction is put on the omission, and the policy is acted upon as if they were. (u)

The following cases are illustrations of this rule.

Flax was insured, *free of average*" from *London to Exeter*. The flax was packed in mats, in twenty-four separate packages, and the policy was expressed to be on "*flax*" generally. The ship, in the course of the voyage, was wrecked before arriving at her port of destination. After the wreck, part of the flax floated ashore in a loose state, out of its packages; and other part was got out of the ship's hold; the whole quantity saved was about one fifth in weight of the whole quantity shipped, and its net produce when sold was about one fortieth in value of the sum at which the flax was insured. All the rest of the flax went to the bottom of the sea: no package came ashore entire, but all that was saved was loose and wetted with sea water: no notice of abandonment had been given. Lord Ellenborough held that, as to the flax that came ashore, there was only a partial loss, for which the underwriters were freed from liability by the memorandum; but that, as to that part of the flax which went to the bottom of the sea, there was an absolute total loss, for which they were liable, notwithstanding the memorandum. (v)

(s) Per Lord Abinger in *Hills v. London Ass. Comp.* 5 Mees. & Wels. 576.

(t) *Stevens on Average*, 224. 5th ed.

(u) *Ibid.*

(v) *Davy v. Milford*, 15 East, 559.

As to the authority of this case, see *Poole v. Protection Ins. Co.* 14 Conn 47. }

Lord Abinger refers to this case, as though the insurance had been expressly made upon each mat of flax separately, and, indeed, supports it on that ground (*w*): in the report of the case, however, there is no statement from which this inference can be drawn, although it is very probable that the policy contained a clause of the nature referred to, the effect of which would be to give the same construction to the insurance as though it had been in terms separate on each separate package.

*An insurance was effected in terms on fifty-four "hogsheads of sugar" warranted "free of average." All the hogsheads came ashore, and not one of them was entirely emptied of sugar, though the quantity left in each was so small, that the amount of sugar saved in all the fifty-four hogsheads put together would not have more than filled one hogshead. This was held not to be an absolute total loss on any one of the hogsheads, although it would have been so if the sugar had been wholly washed out of any one of them. (*x*)

So, where an insurance was effected "on 3224 bushels of wheat" warranted "free of average," and, on arrival at an intermediate port, 586 bushels were found to be so damaged by sea water that they were obliged, by order of the government, to be thrown into the sea, Lord Tenterden, then Mr. J. Abbott, said, "I should strongly incline to the conclusion that this was a total loss of part." (*y*)

Where, however, the cargo is not made up of separate packages, but is shipped in bulk, and, also, insured in bulk, then, though part of such cargo be wholly destroyed by the perils of the sea, it is only an average loss on the whole, and not a total loss on part.

Thus, where a cargo of wheat, valued at 1600*l.*, and "warranted free of average," was shipped in bulk, and insured in bulk by one entire insurance, and a quantity of this wheat, to the value of about 70*l.*, was pumped up out of the hold into the sea during a storm, and totally lost, this was held not to be an actual total loss of part of the wheat, but

Absolute total loss of part of cargo.

Remarks on *Davy v. Milford*.

* 1040

Fifty-four hogsheads of sugar — none of which were quite washed out — no total loss of any one. *Hedburgh v. Pearson*, 7 Taunt. 153.

Actual total loss on 586 bushels of wheat, part of a cargo, insured by bushels. *Cologan v. London Ass. Comp.* 5 Maule & Sel. 456.

Where, however, the cargo is not made up of separate packages, but is shipped in bulk, and also insured in bulk, there can be no actual total loss of part.

Hills v. London Ass. Comp. 5 Mea. & Wels. 569.

(*w*) See in *Hills v. London Ass. Co.* N. Pr. 349. *Stevens on Average*, 237. 5 Mea. & Wels. 569. 5th ed.

(*e*) *Hedburgh v. Pearson*, 7 Taunt. (*y*) *Cologan v. London Ins. Comp.* 5 153. 2 Marshall's Rep. 432. S. C. Holt's Maule & Sel. 456.

Absolute total loss of part of cargo.

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In the United States the doctrine of absolute total loss of part is rejected.

only an average loss on the whole cargo. (z) On its being contended in argument that this cargo was divisible, Alderson B. said, "How? — into particles certainly: if you can say the insurance is on each particle, then you may say there has been a total loss of so many particles;" and Lord Abinger *said decidedly, "when it is an insurance on the bulk, there cannot be a total loss of any part of the cargo." (a)

In the United States this doctrine of a total loss of part has been considerably discussed, and finally rejected. The doctrine there now is, as stated by Mr. Chancellor Walworth, that "the underwriter is not liable for any partial loss on memorandum articles unless there is a total loss of the whole of the particular species, whether the particular article is shipped in bulk, or in separate boxes or packages." (b)¹

Mr. J. Story, referring to the English case of *Davy v. Milford*, says, "upon this case I confess myself to have great difficulties: suppose the insurance had been on coffee or on corn, what difference is there between the loss of a single kernel and a bag? — between the loss of an aggregate mass made up of artificial and separate parcels, or of an aggregate made up of things in their own nature separate. The loss of the whole of a bag of coffee or corn does not seem to me to differ, in principle, from the loss of an equal quantity of coffee or corn in bulk. The meaning of the memorandum has hitherto been supposed to be, that it shall exempt the underwriters from all partial losses or particular averages on the thing insured. What difference is there, in principle or

(z) *Hills v. London Ass. Comp.* 5 is, that in that case the insurance was on so many bushels of wheat taken distributively — in this — on wheat in bulk.

(a) *Hills v. London Ass. Comp.* 5 Mee. & Wels. 569. The distinction between this case and that of *Cologan v. London Ass. Comp.* 5 Maule & Sel. 569,

(b) † In *Wadsworth v. Pacific Ins. Comp.* 4 Wendell, 33, cited in 2 Phillips on Ins. 492. See also *ibid.* pp. 490-497.

¹ See *Poole v. Protection Ins. Co.* 14 Conn. 47; *Wain v. Thompson*, 9 Serg. & Rawle, 115; *Biays v. Chesapeake Ins. Co.* 7 Cranch, 415; 3 Kent. (5th ed.) 298, 299; *Brooke v. Louisiana Ins. Co.* 17 Martin, 530; *Guerlain v. Columbian Ins. Co.* 7 John. 527. In an insurance on "cargo" composed chiefly of lemons and oranges, the whole of the oranges were lost, and the lemons were saved. Fruit was warranted free from particular average. The underwriter was not held for the loss of the oranges. *Humphreys v. Union Ins. Co.* 3 Mason, 429. A total loss cannot take place after part of the goods have been safely landed. *Gracie v. Maryland Ins. Co.* 8 Cranch, 84.

reason, between a partial loss or average by the *damage* of part, and a partial loss by the *destruction* of an integral part of the thing insured ? ” (c) ¹

Absolute total loss of part of cargo.

The reasonings of the great American jurist seem speculatively unanswerable ; but the law and practice of England are conclusively settled by the cases already cited.

There may be a total loss of part of the freight where part of the cargo actually perishes, but not where it is merely left behind by the master, owing to the expense of forwarding it *as compared to its value ; although he may, in leaving it behind, have exercised a wise discretion. (d) ²

Absolute total loss of part of freight.

* 1042

SECT. VI. *Absolute Total Loss on Freight.*

§ 373. An insurance on freight is, as we have already seen, nothing more than an undertaking that, if the shipowner is prevented from earning freight by any of the perils insured against, the underwriters on freight will make good, to the extent of their subscriptions, the loss he has thereby sustained.

Absolute total loss on freight.

General principles as to absolute total loss of freight.

Bearing this principle in mind, in connection with those already established in the preceding part of this chapter, the inquiry as to what constitutes an absolute total loss on freight, so as to give the assured a right to claim the whole amount of the insurance without notice of abandonment, does not seem to present any great difficulty. In general, it may be said that, whenever the happening of the event on which the earning of freight depends is rendered *absolutely impossible*, or, in any practical sense, *utterly hopeless*, by means of the perils insured against, this is a case of absolute total loss on freight, in respect of which the assured may recover

(c) † *Humphrey v. Union Ins. Comp.* (d) *Mordy v. Jones*, 4 B. & Cr. 304.
3 Mason's Rep. 429. 2 Phillips on Ins. Brockelbank v. Sugrue, 1 Mood. & Rob.
491. { See *Biays v. Chesapeake Ins.* 103.
Co. 7 Cranch, 415. *Morean v. United*
Ins. Co. 1 Wheaton, 219, 227. }

¹ See also the remarks on *Davy v. Milford*, in *Poole v. Protection Ins. Co.* 14 Conn. 47.

² See *post*, 1139 to 1144, and in notes.

Absolute total
loss on freight.

without notice of abandonment.¹ The question, therefore, turns in some measure on the nature of the contract under which freight is payable. If the freight insured be the hire of a ship for an entire voyage, under the terms of a charter-party, so that no freight is payable except on the arrival of that particular ship at the port of destination outwards, or at her home port, then, if such arrival of the ship be rendered impossible or hopeless, either by her foundering at sea, or being justifiably sold as irreparable in the course of the voyage, this ought, on principle, to be an absolute total loss of freight, quite irrespective of all questions as to the state of the cargo. Where, on the other hand, the earning of the freight insured is not thus made to depend on the arrival of

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*the ship under the charter-party, but *on the delivery of the goods according to the terms of the bill of lading*, the chance of the ship's arrival would seem to be less important as the criterion of the right to recover a total loss on freight without notice of abandonment, than the chance that the goods may be forwarded, so as to earn freight, by another ship (e): in such cases, accordingly, if, although the original ship be wholly destroyed, or justifiably sold as irreparable, yet the cargo is preserved in such a state that it may be sent on, so as to earn freight, by a substituted ship, it should seem that the assured, in order to recover as for a total loss on freight, ought, on principle, to give notice of abandonment.

Two classes of
cases.

The cases on this subject seem divisible into two main classes: 1. Those in which the ship has foundered at sea, or been forcibly taken out of the hands of her owners, as by capture, detention, &c. and not restored before action brought; 2. Those in which both the ship and cargo, or either of them, have been sold by the master abroad. With regard to the first class of cases there is no difficulty: if the ship with a full cargo on board has foundered at sea, so that ship and cargo are both hopelessly lost to the assured, without any

Foundering of
both ship and
cargo.

(e) *Shipton v. Thornton*, 9 Ad. & Ell. 314.

¹ In *Herbert v. Hallett*, 3 John. Cas. 93, Mr. Justice Kent said, — "It appears to me, that the same peril, and to the same extent, ought to exist, to authorize a recovery on a policy on freight, as on a policy on the ship. If the assured could not recover a total loss on the ship, I see no reason why there should be a recovery on the freight."

assignable chance of salvage, this is a clear case of absolute total loss on the freight, the earning of which has become impossible under the circumstances.¹ So, where the freight insured is the hire of a ship under charter party, the same consequence follows, if the ship is lost at sea after having once broken ground on the voyage, even though at the time of loss no cargo may have been shipped on board. (*f*)²

Absolute total loss on freight.

Foundering of chartered ship with no cargo on board.

So, even where the freight insured is to become payable on delivery of the goods, by a general ship, under the term of the bill of lading, although a full cargo may not be actually on board at the time of loss, yet, if a full cargo have been then contracted for, and is lying ready to be shipped on board, and the ship be ready to receive it, in this case also the assured *on freight may recover as for a total loss, though only a part, or even though none, of the cargo may actually be on board the ship at the time of loss (*g*); if, on the other hand, in such case the full intended cargo be neither shipped on board nor contracted for at the time of loss, and the ship is not then in a state of readiness to receive it, but is lost with only a part of the intended cargo on board, this is an absolute total loss, not of the whole freight on the full cargo, but only of the freight on such part of it as is actually shipped and lost. (*h*)

Of general ship when only part of cargo is on board, but all contracted for.

* 1044

Absolute total loss of part of freight, by loss of part of cargo.

On the same principle, if the event, on which the earning of the entire freight is made to depend under the charter-party, be the ship's arrival at her port of ultimate destination with a certain description of cargo, and the happening of this event is rendered hopeless by the capture of the ship (unredeemed by subsequent restoration,) before this particular description of cargo is loaded on board, this is a clear case of absolute total loss on the whole freight. (*i*)

Capture of ship and cargo, the loss continuing total till action brought, an absolute total loss on freight. *Atty v. Lindo*, 1 Bos. & Pull. N. R. 236.

So, where, under a policy on ship and freight for a Baltic risk, it appeared that the ship was a general ship, and the

Seizure and sale of outward cargo an absolute total loss on outward freight. *Wilson v. Forster*, 6 Taunt. 25.

(*f*) *Thompson v. Taylor*, 6 T. Rep. 478. *Horncastle v. Stuart*, 7 East, 400. *Mackenzie v. Shedden*, 2 Camp. 431. (*A*) *Forbes v. Cowie*, 1 Camp. 520. *Forbes v. Aspinall*, 13 East, 323. (*i*) *Atty v. Lindo*, 1 Bos. & Pull. N. R. 236.

(*g*) *Devaux v. J'Ansen*, 5 Bingh. N. C. 519, where all the previous authorities are cited.

¹ See *M'Gaw v. Ocean Ins. Co.* 23 Pick. 406, 410.

² See *Robinson v. Manufacturers Ins. Co.* 1 Metcalf, 143, 146; *ante*, 200 to 202, in notes, 463, and cases in note; *Adams v. Warren Ins. Co.* 22 Pick. 163.

Absolute total loss on freight.

But where the insurance is on *homeward* freight — if ship arrives earning freight, though with another cargo, this is not a total loss on freight. *Everth v. Smith*, 2 Maule & Sel. 278.

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Where the insurance is on an entire freight for the round voyage, loss of ship on the homeward passage, is an absolute total loss on freight. *Mackrell v. Simond*, 2 Chitt. Rep. 660.

Where both ship and cargo are justifiably sold abroad, this is an absolute total loss on freight, and no notice of abandonment is necessary.

freight insured was made payable on delivery of the cargo at the ship's port or ports of discharge in the Baltic, it was held that seizure, condemnation, and sale of this cargo, under the Berlin decree, in the ship's port of discharge, involved an absolute total loss of the *outward* freight, though the ship, which had been also seized, was repurchased by the master, and ultimately arrived earning *homeward* freight (*j*): had the policy in this case been on freight for the homeward voyage, under charter-party, then, although the cargo first shipped on board at the foreign port had been taken out and sold, yet, if the ship had ultimately arrived at her home port so as to earn freight with another cargo, this would not have been a total loss on freight under *such* policy. (*k*)

*On the same principle, where the event on which the earning of freight is made to depend under the charter-party is the ship's completing in safety her entire voyage out and home, then, if the ship be lost on the *homeward* passage, there will be an absolute total loss on the whole freight; if, on the other hand, the voyage out is distinct from the voyage home, and freight have been earned on the ship's arrival outwards, her subsequent loss on the homeward passage is not an absolute total loss of the whole freight. (*l*)

§ 374. As to the second class of cases in which ship and cargo, or either of them, have been sold abroad by the master, it would seem to be clear, on principle, and is, in fact, undoubted, that, if *both ship and cargo* have been sold abroad, under such circumstances of urgent necessity *as to justify their sale*, the assured may, without any notice of abandonment, recover as for a total loss on the freight, the earning of which, under the circumstances, has become wholly impossible, owing to events beyond his control (*m*): on the other hand, where the sale is not thus justified by necessity, but the ship might have been repaired, or the cargo sent on so as to earn

(*j*) *Wilson v. Forster*, 6 Taunt. 25. 1 Marshall, 425, S. C. S. P. in United States.
† *Hutin v. Union Ins. Comp.* 1 Wash. C. C. Rep. 530.

(*k*) *Everth v. Smith*, 2 Maule & Sel. 278. *Brockelbank v. Sugrue*, 1 Mood. & Rob. 102. See also *Barclay v. Stirling*, 5 Maule & Sel. 6.

(*l*) *Mackrell v. Simond*, 2 Chitty's Rep. 660, (cases in time of Lord Mansfield.) See also S. C. Abbott on Shipping, 418, 6th ed.

(*m*) *Idle v. Royal Exch. Comp.* 3 Moore, 115. 8 Taunt. 755.

freight, it would seem, on principle, that the shipowner ought not to be allowed to avail himself of such unjustifiable sale, in order to throw on the underwriter on freight a total loss on that interest which, in the case supposed, has been caused, not by the perils insured against, but by the unauthorized act, either of himself, or of the master, as his agent,¹ at all events, it would appear, that he could only so entitle himself in cases where he has given, and the underwriter accepted, notice of abandonment.

Absolute total loss on freight.
Aliter, where such sale is not justifiable.

The mere fact, however, of notice of abandonment being given cannot, *per se*, give the assured on freight a right to recover as for a total loss where the sale is not justifiable: it is only where the underwriter has accepted or acted upon such *notice that it can bind the rights of the parties; as Mr. Baron Parke observes, in giving the judgment of the Court of Exchequer Chamber in *Benson v. Chapman*, "if the loss of freight be not total in its nature, abandonment cannot make it so." (n)

Nor will notice of abandonment in such case entitle him to claim a total loss, except where accepted or acted upon.

* 1046

The principle, in short, seems to be this, — where the sale of ship and cargo is justified, notice of abandonment to the underwriter on freight is unnecessary; where such sale is not justifiable it is inoperative, unless accepted or acted upon.

The case generally cited, as showing notice of abandonment to be necessary, in order to recover for a total loss on freight, where ship and cargo had been sold abroad, is that of *Parmeter v. Todhunter*, which was a policy of insurance "on the freight of the ship *Portsea*," insured from *Berbice* to *London*: the ship, in the course of her voyage, was captured, recaptured, and carried into *Grenada*, where she was sold with the whole of her cargo: — the plaintiff, who had given no valid notice of abandonment, claimed a total loss: it was contended that no notice was necessary, *sed non allocatur*, for the goods might have been brought home in another ship, and so freight have been earned (o): it is clear, by what fell from Lord Ellenborough, that the circumstances of this case were

Where goods might have been sent on so as to earn freight, sale of ship and cargo will not make an absolute total loss on freight.
Parmeter v. Todhunter, 1 Campb. 541.

Remarks on this case.

(n) *Benson v. Chapman*, in error, from the short-hand writer's notes of the judgment. (o) *Parmeter v. Todhunter*, 1 Camp. 541.

¹ See post, 1141, in notes.

Absolute total
loss on freight.

not such as to make the *sale of the whole ship and cargo* justifiable, but only to warrant, at the utmost, the hypothecation of the ship, and the sale of *part of the cargo*: the case, therefore, is rather an authority for the position, that there is no total loss on freight by an unjustifiable sale of ship and cargo — at all events, without notice of abandonment — than for the position, that such notice is requisite where ship and cargo have been justifiably sold.

Where sale of ship and cargo is justifiable, no notice of abandonment is required to make a total loss on freight: where sale not justifiable, such notice is inoperative.

Green v. Royal Exch. Ass. Comp. 6 Taunt. 66; 1 Marsh. 447.

1047 *

The next case in which the point arose — *Green v. The Royal Exchange Assurance Company* — is quite consistent, when its facts are considered, with that last cited. In this case the insurance was on “freight, by the ship *Defiance*, *at and from the *Canary Islands to London*:” the ship having sailed on her voyage, with a full cargo on board, was, in consequence of sea-damage, obliged to put back: her cargo having been necessarily unshipped, and the ship being found so disabled that it would be impossible to bring her home without repairs, which could not be procured where she was, both ship and cargo were sold: the purchaser of the ship, having repaired her, brought her home with half a cargo; her captain (*who was also owner and plaintiff in the action*) bought another ship of small burden, in which he also brought goods to London, but none of the original cargo: having brought his action against the underwriters on freight for a total loss, two objections were made to his right of recovery. 1. That he had given no notice of abandonment; 2. That the sale was not justified by necessity. Chief J. Gibbs, as to the first objection, which was supported on the authority of *Parmeter v. Todhunter*, held that there was nothing in it; but, as to the second he granted a new trial, in order that the jury might consider whether the sale of the ship, under the circumstances, was such a measure as a prudent owner, if uninsured, would have resorted to; or whether he would not have repaired and sent her on, so as to earn freight. (p) “I think,” said the Chief Justice, “the assured ought to have acted as if the adventure had not been insured; and, if a man of common prudence, would have repaired her, not being insured, he should have done so, *on account of the underwriters, otherwise he would have been selling the ship for*

(p) *Green v. Royal Exch. Ass. Comp.* 6 Taunt. 66. 1 Marshall's Rep. 447.

the purpose of throwing the loss" (of freight) "on the underwriters." (q)

Absolute total loss on freight.

This case, therefore, shows — 1. That no notice of abandonment is requisite where the ship and cargo have been justifiably sold; 2. That, unless such sale be justifiable, the assured on freight cannot recover as for a total loss.

Remarks on this case.

The former of these points was all that was determined in *Idle v. Royal Exchange Assurance Company*, which was the *next in which the point arose. In that case the insurance was "on the freight of the ship *Ajax*," for a voyage from Quebec to her port of discharge in the United Kingdom: the ship and cargo having been sold abroad by the master and one of the part-owners, under circumstances (to be elsewhere detailed) which, in the opinion of the Court of Common Pleas, justified the sale, on the ground of urgent necessity, that court held that no notice of abandonment was necessary to entitle the assured on freight to recover a total loss. (r) When, however, the same case came before the Court of King's Bench on a special verdict, that court directed a *venire de novo*, on the ground that the *necessity of the sale* was not distinctly found in the special verdict, and could not be inferred from the facts stated; and Mr. J. Bayley added, on the same occasion, "That the question, whether the circumstances amounted to an abandonment, might also be left open," (s) *i. e.* whether, even with notice of abandonment, the assured would have had a right to recover as for a total loss on freight.

* 1048

Idle v. Royal Exch. Ass. Comp. 3 Moore, 115; 8 Taunt. 755.

S. C. before the King's Bench in error, 3 Brod. & Bingh. 151; note (d).

In the preceding cases both ship and cargo had been sold: in that which follows only the ship had been sold, but the cargo sent on: it was an insurance "on freight, per ship *Olive Branch*," from the Cape of Good Hope to London; the ship, while loading in Table Bay, was driven ashore, and sold under circumstances of such urgent necessity as, in the opinion of the court, fully to justify the sale; the cargo, one third of which was loaded on board at the time of loss, and the rest engaged, was immediately sent on to England in another vessel: the plaintiff claimed a total loss on freight; it was objected that he should have given notice of abandon-

Is there a total loss of freight, without notice of abandonment, where ship has been justifiably sold, but cargo is sent on and arrives? *Mount v. Harrison*, 4 Bingh. 388; 1 Moore & P. 14.

(q) 1 Marshall's Rep. 452.

(s) 3 Brod. & Bingh. 151, note (d).

(r) *Idle v. Royal Exch. Ass. Comp.* 3 Moore, 115. 8 Taunt. 755.

Absolute total
loss on freight.

Remarks on
this case.

1049 *

Where cargo is
necessarily sold
at an intermediate
port, under such
circumstances
that no freight
pro rata is
earned:
semble, this is
an absolute
total loss on
freight.
Vlierboom v.
Chapman,
13 Mees. &
Wels. 230.

ment, but the court, under the circumstances of the case, thought it unnecessary, and the plaintiff recovered the whole amount of his insurance. (t)

It must be assumed in this case that the event upon which *the earning of the freight insured was made to depend, was the arrival of the ship under the charter-party: if the freight insured had been made payable on the delivery of the goods, in terms of the bill of lading, it should seem that, as the goods were actually sent on, and arrived so as to earn freight, by another ship, that this was precisely the case contemplated by Lord Ellenborough in *Parmeter v. Todhunter*, and that, as the loss on freight became, in the event, less than total, the assured would not have been entitled to claim as for a total loss (at all events, without notice of abandonment); that which he should have abandoned being the chance of the cargo arriving, so as to earn higher freight, than that which the shipowner would have to pay for the hire of the ship in which it was sent on. (u) Where, under similar circumstances, the master sold, not only the ship, but also the cargo, from the impossibility of sending it on, except at an exorbitant rate of freight, this was held in the United States, and as it seems justly, an absolute total loss of freight. (v) ¹

Where a cargo of perishable goods loaded on board a general ship, and deliverable to the consignees under terms of the bill of lading, on payment of freight, is necessarily unloaded at an intermediate port in the course of the voyage for the repairs of the ship, and there, on survey, found so sea-damaged that it is necessarily sold by the master, in order to prevent its perishing by the rapid progress of putrefaction, in such case, if neither the merchant (or his agent,) nor the shipowner, have been present at the sale, nor have any knowledge of it till after it has taken place, the present doctrine of the English law is, that no freight whatever is due on the cargo so sold. (w) In such case, therefore, as the earning of

(t) *Mount v. Harrison*, 4 Bingham 388; *America*, 5 Binney, 525, cited 2 Phillips on Ins. 353.

(u) *Shipton v. Thornton*, 9 Ad. & Ell. 314. (w) *Vlierboom v. Chapman*, 13 Mees.

(v) *† Callender v. Ins. Comp. of North & Wels. 230.*

¹ See *Hugg v. Augusta Ins. & Banking Co.* 7 Howard, (U. S.) 505.

freight has become an absolute impossibility by a justifiable sale of the cargo (x), it should seem, on principle, *and has accordingly been so held in the United States, that this is an absolute total loss of freight. (y) ¹

Absolute total loss on freight.

* 1050

Nothing short, however, of this absolute impossibility of sending on the cargo with any chance of its arriving in its original character at its port of destination, will justify the master in selling it at an intermediate port, or entitle the assured, in consequence of such sale, to throw the loss on the underwriters on freight. Thus, where the ship having been driven back, in consequence of sea-damage, to her port of loading, it became necessary to unload the cargo, part of which was, on survey, found so damaged that the master, after having repaired his ship, sold it on the spot, instead of taking it on, because, if put on board as it was, it might have ignited the rest of the cargo, and, if he waited till it was fit to ship, the expense would have exceeded the freight he could earn upon it—Lord Tenterden held that the assured could not claim, from the underwriters on freight, a total loss upon the part of the cargo so sold. (z) ²

But nothing short of necessity will justify such sale of cargo: or entitle the assured in respect thereof to claim a total, or partial, loss on freight. *Mordy v. Jones*, 4 B. & Cr. 394.

(x) *Roux v. Salvador*, 3 Bingh. N. C. 266.

(z) *Mordy v. Jones*, 4 B. & Cr. 394. S. C. 6 Dowl. & Ryl. 479.

(y) † *Hurtin v. Union Ins. Comp.* 1 Wash. 530, cited, 2 Phillips on Ins. 353.

¹ In case of an insurance on freight, there is no total loss in respect to memorandum articles so long as the goods have not totally lost their original character, but remain *in specie*, and in that condition are capable of being shipped to their destined port, no matter what may be the extent of the damage. If, however, the articles are not capable of being carried *in specie*, to the port of destination, arising from danger to the health of the crew or to the safety of the vessel, or the public authorities at the port of distress order the articles to be thrown overboard, from fear of disease, there would be a total loss. *Hugg v. Augusta Ins. & Banking Co.* 7 Howard, (U. S.) 595.

² See *Jordan v. Warren Ins. Co.* 1 Story, C. C. 342, cited *post*, 1141, in note; *Whitney v. New York Ins. Co.* 18 John. 208. In construing the contract of insurance on freight, the interest of the insured, or of the underwriters, in respect to the cargo, is not considered. Therefore, if the vessel is in a condition to carry on the cargo to the port of destination, or another vessel can be procured for that purpose, it is the duty of the owner of the vessel to carry it on, although it may be for the interest of the insured and of the underwriters of the cargo to sell it at the port of distress. If sold under these circumstances, the insured cannot recover for a total loss of freight. *Hugg v. Augusta Ins. & Banking Co.* 7 Howard, (U. S.) 595. It would seem to be otherwise, however, if it should appear, that repairs rendered necessary by damage to the original vessel, or the procurement of another vessel, would inevitably produce such a retardation of the voyage as would, in all probability, occasion a destruction of the article, *in specie*, before it could arrive at the port of destination, or, from its dam-

Absolute total
loss on freight.

No notice of
abandonment is
required under
a policy on
profits.

§ 375. In a policy on the profit of goods, the underwriter engages that the goods shall not be prevented by the perils insured against from so arriving as to earn a profit (a): if, then, the goods are so prevented from arriving by the perils insured against, there is a total loss on the expected profits, and this without any necessity for a notice of abandonment; for, as a transfer of goods by abandonment necessarily includes the eventual profit on such goods, a separate abandonment of expected profit would be a nugatory and idle form; for the same thing cannot be abandoned to two different persons at the same time. (b)

The rule, therefore, is, that a total loss of the goods involves a total loss of the profits expected to arise from their sale, and that this may be recovered without notice of abandonment.¹ Commissions stand upon the same footing as profits, a policy on commissions being an undertaking that the assured shall not be prevented by the perils insured against from earning a commission on the sale of the goods (c): hence, if the assured have done his part towards earning the commissions, but the goods never arrive, he may recover for a total loss; and, as in such case he could assign nothing by abandonment, no notice of abandonment is required.

1051*

Nor under a
policy on com-
mission.

(a) 2 Phillips on Ins. 244.

East, 551. { Mumford v. Hallett, 1 John.

(b) Benecké, Pr. of Indem. 386. See 433. }

per Lawrence, J. in Barclay v. Cousins,

(c) 2 Phillips on Ins. 368. { See New
York Ins. Co. v. Robinson, 1 John. 618. }

aged condition, it could not be reshipped in time, consistently with the health of the crew or safety of the vessel, or would not be in a fit condition from pestilential effluvia or otherwise, to be carried on. In such case, it would become the duty of the master to sell the goods for the benefit of whom it might concern. Hugg v. Augusta Ins. & Banking Co. 7 Howard, (U. S.) 595.

¹ See Foadick v. Norwich Ins. Co. 3 Day, 106.

*CHAP. VIII.

*1052

OF CONSTRUCTIVE TOTAL LOSSES.

SECT. I. *General Doctrine of Constructive Total Loss.*

§ 376. As we have already seen, a constructive total loss in insurance law is that which entitles the assured to claim the whole amount of the insurance, on giving due notice of abandonment; and that is, generally speaking, a case of constructive total loss where the thing insured has been reduced to such a state, or placed in such a position by the perils insured against, as to make its total destruction or annihilation, though not inevitable, yet highly imminent, or its ultimate arrival under the terms of the policy, though not utterly hopeless, yet exceedingly doubtful. For instance, though the thing insured may not be absolutely destroyed, or irretrievably lost, yet, to avail ourselves again of the language of Lord Abinger: "there may be a *capture*, which, though *prima facie* a total loss, may be followed by a recapture which would revest the property in the assured. There may be a *forcible detention*, which may either speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which *renders the ship innavigable, without any reasonable hope of repair*; or by which the goods are partly lost, or so damaged, that they are not worth the expense of bringing them, or what remains of them, to their destination." (a) ¹

General doctrine of constructive total loss.

Definition of a constructive total loss.

Cases of constructive total loss.

(a) 3 Bingh. N. C. 286.

¹ The right to abandon exists when the ship, for all the useful purposes of the voyage, is gone from the control of the owner; as in the cases of submersion, or shipwreck, or capture, and it is uncertain, or the time unreasonably distant, when it will be restored in a state to resume the voyage; or when the risk and expense of restoring

General doctrine of constructive total loss.

Notice of abandonment.

In all such cases, the assured, if he wishes to recover for a total loss, must, as a necessary preliminary to so

the vessel, are disproportioned to the expected benefit and objects of the voyage. 3 Kent, (5th ed.) 321; *Peele v. Merchants Ins. Co.* 3 Mason, 27. See also *Amer. Ins. Co. v. Ogden*, 15 Wendell, 538; *S. C.* 20 Wendell, 287; *Cincinnati Ins. Co. v. Bakewell*, 4 B. Monroe, 541; *Marcadier v. Chesapeake Ins. Co.* 8 Cranch, 39. It is a general rule in the United States, that if the ship or goods insured be damaged to more than half of the value, by any peril insured against, the assured may abandon and recover for a total loss; for if the ship or cargo be damaged so as to diminish their value above half, they are said to be constructively lost. "The rule," says Mr. Chancellor Kent, "came from the French law, and is to be found in the treatise of *Le Guidon*, where it is applied to the case of goods, and in respect to both ship and cargo, the rule has been incorporated into the American jurisprudence." 3 Kent, (5th ed.) 329; *Gardiner v. Smith*, 1 John. Cas. 141; *Dickey v. N. York Ins. Co.* 4 Cowen, 222; *Marcadier v. Chesapeake Ins. Co.* 9 Cranch, 39; *Ludlow v. Columbian Ins. Co.* 1 John. 335; *Peters v. Phoenix Ins. Co.* 3 Serg. & Rawle, 25; *Budd v. Union Ins. Co.* 4 M'Cord, 1; *Dickey v. American Ins. Co.* 3 Wendell, 653; *Peele v. Merchants Ins. Co.* 3 Mason, 27; *Center v. American Ins. Co.* 7 Cowen, 564; *S. C.* 4 Wendell, 45; *Deblois v. Ocean Ins. Co.* 16 Pick. 303; *Patapasco Ins. Co. v. Southgate*, 5 Peters, 604; *Bradley v. Maryland Ins. Co.* 12 Peters, 378, 396; *Citizens Ins. Co. v. Glasgow*, 9 Missouri, 411. Mr. Chief Justice Parsons considered damage to the ship, exceeding half her value, to be a constructive shipwreck. He says, "when the ship becomes a wreck by any of the perils insured against, it is generally a total loss. The ship becomes a wreck, when, in consequence of the injury she has received, she is rendered absolutely unable to pursue the voyage without repairs exceeding the half of her value." *Wood v. Lincoln and Kennebec Ins. Co.* 6 Mass. 482. In reference to this American doctrine of constructive or technical total loss, Mr. Justice Putnam, in *Deblois v. Ocean Ins. Co.* 16 Pick. 303, 309, 310, remarked; — "Now it is a fixed rule, that if the ship be injured by the perils insured against so as to require repairs to the extent of more than half her value, the insured is entitled to abandon as for a total loss. *Peele v. Merchants Ins. Co.* 3 Mason, 27. That position of the eminent judge of the Supreme Court of the United States for this circuit, [Mr. Justice Story,] is proved by the many authorities cited to that point. This rule will be found among the principles of the law of insurance, embodied by Parsons, Ch. J., in a most learned opinion in the case of *Wood v. Lincoln and Kennebec Ins. Co.* 6 Mass. 479. He cited very few authorities, but the opinion is well supported in the books." After remarking upon some of the rules for the calculation of this half value, Mr. Justice Putnam added, — "Judges would be influenced, without doubt, by the consideration, whether abandonments for technical total losses ought to be favored or restricted. We are among those who think that this part of the law of insurance, as it now is administered, is a clear departure from the great principle of indemnity, upon which the contract of insurance should rest. According to the original intent, surely, the underwriters were to pay the damage, the actual loss. They were not to become shipowners, brokers, or merchants. This idea was expressed by Baller, J., one of the most eminent judges of England, about fifty years ago. *Mitchell v. Edie*, 1 T. Rep. 615. We must decide the law as we now find it. But where a construction is to be made, in the absence of binding authority, we prefer that which restrains, rather than that which enlarges the right to make a technical total loss." See *Richie v. United States Ins. Co.* 5 Serg. & Rawle, 501; *Orrok v. Commonwealth Ins. Co.* 21 Pick. 456, 470. The case of *Peele v. Merchants Ins. Co.* 3 Mason, 27, has been regarded as very much favoring abandonments for technical or constructive total losses, and the doctrines of that case on many points have been expressly rejected in *Massachusetts*. See *Deblois v. Ocean Ins. Co.* 16 Pick. 310 to 312. See also 3 Mason, p. 38. Per Shaw, Ch. J., in *Sewall v. U. States Ins. Co.* 11 Pick. 95.

doing, give due *notice of abandonment*:¹ that is, an explicit (b) *intimation to the underwriter that he offers to cede or abandon to them unconditionally (c) his whole interest (d) in the thing insured, or the remains of it, as far as it is covered by the policy; and this notice he must give in reasonable time. (e)

General doctrine of constructive total loss.

* 1053

This is the first step; having done this, his right to insist upon such notice, and recover as for a total loss, depends, in English law, upon the point whether the state of things which entitled him thus to give notice of abandonment continued down to the time of bringing the action.² In our law, therefore, there are two main questions to be considered in every case of constructive total loss: 1. Was the state of things such as, *primâ facie*, to entitle the assured, on receiving intelligence thereof, to give notice of abandonment? 2. Did it continue such down to the time of action brought, as to entitle him to follow up such notice and recover as for a total loss?

The state of things which entitles the assured to give notice of abandonment, is different to that which will entitle him to recover as for a total loss.

§ 377. *The first question then is, upon what kind of intelligence the assured may give notice of abandonment*: as to this, it may be answered generally, that he has, *primâ facie*, a right to give such notice on receiving intelligence of any such marine casualties as those just referred to, which, though they do not involve the absolute destruction or irretrievable loss of the thing insured, yet, render its destruction highly probable, or its ultimate recovery very doubtful; *and these are the only kind of casualties which can justify a notice of abandonment*; no amount of damage, however great, which does not threaten the entire destruction of the thing insured (f); no

Upon what kind of intelligence the assured may give notice of abandonment.

(b) *Thellusson v. Fletcher*, 1 Esp. 72.
Parmer v. Todhunter, 1 Camp. 591.

(c) See *post*, Chap. IX. Sect. I. p. 1157.

(d) *Ibid*.

(e) As to what is reasonable time, see *post*, Chap. IX. Sect. III. p. 1163.

(f) *Camlet v. St. Barbe*, 1 T. Rep. 187. *Furneaux v. Bradley*, Park on Ins. 365, 8th ed.

¹ *Ante*, 998, and cases in note. Where an injury to an insured vessel can be repaired at an expense less than her value when repaired, the assured cannot recover for a total loss without abandoning to the underwriters. *Smith v. Manuf. Ins. Co.* 7 Metcalf, 448.

² It is otherwise in these United States. See *ante*, 993, 994, and cases in note, and *post*, 1057.

General doctrine of constructive total loss.

He has only this right in cases of constructive total loss.

1054 *

But on hearing of a constructive total loss, he may give such notice immediately.

amount of difficulty in regaining *possession* of it, which does not involve an absolute temporary privation of *ownership*, or alienation of *property* (*g*), can make a case of *constructive total loss. "The assured cannot elect to turn what, at the time when it happened, was only an average loss, into a total one by abandoning." (*h*) "There is no instance," says Mr. J. Buller, "where the owner can abandon, unless at some period or the other of the voyage there has been a (constructive) total loss." (*i*) "There is not any principle," says Lord Ellenborough, "which authorizes abandonment, unless where the loss has been actually total, or *in the highest degree probable*, at the time of the abandonment." (*j*)¹

Supposing, however, the case to be such as *prima facie* to justify the assured in giving notice of abandonment, he is not bound, before giving it, to wait for full and accurate information, but may give it at once upon a mere report or rumor of capture, detention, innavigability, or any other casualty, which, supposing the intelligence to be well founded, would be a clear case of constructive total loss. (*k*)²

"In cases like this," said Lord Ellenborough, "men must act upon probable information, and leave the effect of their acts to be determined by the eventual truth or falsehood of the intelligence they receive. If I hear of my ship's being taken in the East or West Indies, I am not obliged to wait till I certainly know the event by the testimony of those who were present.³ Provided the event has once existed, what I

(*g*) *Thorneley v. Hebson*, 2 B. & Ald. 513.

(*h*) Per Lord Mansfield in 2 Burr. 697.

(*i*) 1 T. Rep. 191. The learned judge uses the term "total loss," without qualification, but the whole tenor and language of his judgment shows that he was speaking of a technical or constructive total loss.

(*j*) Per Lord Ellenborough in *Anderson v. Wallis*, 2 Maule & Sel. 240.

(*k*) *Bainbridge v. Neilson*, 1 Camp. 240. In the United States a report in a newspaper has been held a sufficient foundation for notice of abandonment. † *Boesley v. Chesapeake Ins. Comp.* 3 Gill & John. Rep. 450; and see 2 Phillips on Ins. 380.

¹ See *Peele v. Merchants Ins. Co.* 3 Mason, 27, 66, 67; 3 Kent, (5th ed.) 321; *Fontaine v. Phoenix Ins. Co.* 11 John. 293; *Bradley v. Maryland Ins. Co.* 12 Peters, 378, 398.

² An abandonment may be made on information of a capture, given by a pilot who was present at the capture. *Munson v. New Eng. Mar. Ins. Co.* 4 Mass. 88, 90.

³ On intelligence of a threatened seizure of property, the assured may wait till he receives information of an actual seizure before he abandons. *Duncan v. Koch*,

do, believing it to have taken place, must be valid and effectual." (l)

General doctrine of constructive total loss.

Of course, if it turns out that the intelligence upon which the assured acted, in giving notice of abandonment, was totally false and unfounded, the notice of abandonment is *entirely inoperative; in fact, is a mere nullity. (m) "The effect of an offer of abandonment," said Lord Ellenborough, "is that, if it appears to have been properly made upon supposed facts, which turn out to be true, the assured has put himself in a condition to insist on his abandonment. But it is not enough that it was made properly on assumed facts, if it turn out that none such existed; it may be said to be properly made upon notice received, and *bona fide* credited by the assured, of his ship having been wrecked, whether such intelligence were true or not, and although the latter conveying it turn out to be a forgery; yet clearly no right of action would vest in him, founded upon an abandonment made on false intelligence. If the facts be all imaginary and founded on misconception, the whole foundation of the abandonment fails." (n)

If the intelligence turn out to have been totally false, the notice of abandonment goes for nothing.

* 1055

True effect of a notice of abandonment.

And, in order to make a notice of abandonment valid, not only must the information on which it is founded prove true, *but it must also be justified by the state of facts existing at the time when it is actually given.*¹ Even though the facts upon which it was founded were truly reported, and were in themselves such as to justify the assured in giving notice of abandonment, yet, if they have ceased to exist before the

No notice of abandonment can be valid unless justified by the facts as they exist at the time it is made.

(l) Per Lord Ellenborough in *Bainbridge v. Neilon*, 1 Camp. 240.

Emerigon, chap. xvii. sect. 6, vol. ii. p. 233, ed. 1827. "If an abandonment has

(m) Le *détassement* fait par erreur ne produit aucun effet, lorsque l'erreur tombe sur quelqu' une de ces choses, qu'il faut connaître pour opérer un abandon régulier et valable, comme si la nouvelle de l'accident se trouvait fautive.

been made where there has been no capture, it, of course, goes for nothing." Per Lord Ellenborough, 1 Camp. 240.

(n) Per Lord Ellenborough in *Bainbridge v. Neilon*, 1 Camp. 240.

Wallace, 33. So, on intelligence of capture, the assured may wait the event, and abandon on intelligence of condemnation. *Maryland and Phoenix Ins. Co. v. Bathurst*, 5 Gill & John. 159.

¹ See *Booley v. Chesapeake Ins. Co.* 3 Gill & John. 450; *ante*, 993, 994, and cases cited; *Dorr v. Union Ins. Co.* 8 Mass. 502; *Robinson v. Jones*, 8 Mass. 536; *Marshall v. Delaware Ins. Co.* 4 Cranch, 209; 8 C. 2 Wash. C. C. 54. An abandonment on the mere ground that a vessel is stranded does not disclose a sufficient reason to justify it. *Booley v. Chesapeake Ins. Co.* 3 Gill & John. 450.

General doctrine of constructive total loss.

Abandonment can be made only according to the facts at time of making it.

1056 *

But even though the loss at the time of giving notice was constructively total, the assured cannot recover as for a total loss, unless it continues so down to the time of bringing the action.

time at which such notice was given, it will have no force or effect whatever. Thus, where the assured, on hearing of the capture of his ship, gave notice of abandonment, but the ship had been, in fact, re-captured, though not to his knowledge, before such notice was given, the court held that it was entirely inoperative, *for an abandonment could be made only according to the facts at the time of making it.* (o) Lord Ellenborough said, that to "give effect to such a notice of *abandonment would grievously enlarge the responsibility of the underwriters: it would be to make them answerable, not for the actual loss, but for a supposed total loss, which had, in fact, ceased to exist." (p)

The law in the United States, and also in France, is in this respect the same with our own. (q)¹

But, even though the intelligence may have been true, and the state of things, at the time the notice was given, such as to justify its being given, (i. e. though the loss may have continued constructively total at the time the assured gave notice of abandonment,) yet the undoubted doctrine of the English law is, that *the right of the assured, after having given such notice, to recover as for a total loss, depends entirely on the state of things as it exists at the time of action brought*: if before the commencement of the action the thing insured be restored, under such circumstances, and in such a state, that the assured may, if he pleases, take possession of it, and may reasonably be expected so to do, this defeats his right to recover as for a total loss. (r) Lord Tenterden, in the last case in which the point was mooted, thus states the law as now understood in this country: "The abandonment is to be viewed with regard to the *ultimate state of facts as appearing before the action brought*, according to the opinion of the court in *Bainbridge v. Neilson*. Doubts

(o) *Bainbridge v. Neilson*, 10 East, 329. *Parsons v. Scott*, 2 Taunt. 363. *Falkner v. Ritchie*, 2 Maule & Sel. 290.

(p) 10 East, 341.

(q) 2 Phillips on Ins. 273. *Pardemans*, Cours de Droit Comm. part. iv. tit. 5, chap. iii. sect. i. vol. iii. p. 233, ed. 1841.

(r) See the cases cited in next section. *Bainbridge v. Neilson*, 10 East, 329. *Patterson v. Ritchie*, 4 Maule & Sel. 393. *Brotherton v. Barber*, 5 Maule & Sel. 418. *Naylor v. Taylor*, 9 B. & Cr. 725.

¹ See ante, 903, and cases in notes.

were expressed as to the propriety of that decision by very high authority (Lord Eldon) in *Smith v. Robertson* (2 Dow. 474;) but, notwithstanding those doubts, the rule as laid down in *Bainbridge v. Neilson* was adopted in the two subsequent cases of *Patterson v. Ritchie* (4 M. & Sel. 393.) and *Brotherston v. Barber* (5 M. & Sel. 418.) We consider the point to have been well settled, and the rule established by these authorities." (s)

General doctrine of constructive total loss.

*This doctrine of the English law differs, as we have already intimated, from that of the Continent, and of the United States. In France the law is now fixed by the Code de Commerce, which declares (t) that no abandonment can operate as an irrevocable transfer of property, unless it be, 1, *accepted*, or, 2, *adjudged to be valid*. (u) Boulay-Paty thus explains the meaning and effect of this provision of the Code: "*An acceptance by the underwriter waives any defect in the grounds of the abandonment;*" the judgment of the court decides that good grounds existed for it at the time it was made: — if before the abandonment is thus "*adjudged to be valid*," the thing insured should be restored, the right of the assured to insist on his abandonment is *not* thereby defeated; for the judgment when given; has a retrospective effect, and, if it be in favor of the validity of the abandonment, the underwriters are presumed to have acquired the proprietorship of the thing insured, *from the moment the abandonment was first notified to them*. (v)

* 1057

The law of France and the United States differs from our own on this point. French law under the Code de Commerce.

By the existing law of France, then, 1. An abandonment once well made on good grounds is indefeasible, whether it have been accepted or not; 2. If accepted, it is indefeasible, whether it have been made on good grounds or not.

The law as thus explained prevails also in the United States of America. The facts, as they exist at the time a notice of abandonment is given, must be such as to justify it; but if they be so, then the rule is, that "an abandonment

The law in the United States.

(s) Per Lord Tenterden in 9 B & Cr. 725

(t) Art. 385.

(u) I. e. says Boulay-Paty, "ascertained by the judgment of a court of law or tribunal of commerce, to have been made in respect of some one of those casualties, which are specified in the

Code, as alone authorizing an abandonment." Boulay-Paty, Cours de Droit Comm. Mar. tom. iv. p. 377, ed. 1834.

(v) Boulay-Paty, Cours de Droit Comm. Mar. tit. xi. sect. 7 tom. iv. p. 377, ed. 1834. See also Pardessus, Cours de Droit Comm. part iv. tit. v. chap. iii. sect. 4, tom. iii. p. 494. ed. 1841.

General doctrine of constructive total loss.

1058 *

No loss can give the right of abandonment which is not *proximately* caused by the perils insured against.

once rightfully made is binding and conclusive between the parties, and the rights flowing from it become vested rights, and are not to be divested by any subsequent events." (w)¹

*It is a principle in the English law of abandonment, that the doctrine of constructive total loss is only applicable to cases in which the loss is *proximately* caused by some of the perils insured against: thus, as we have seen, disappointment of arrival by interdiction of commerce, or by being turned away from the port of destination, being risks not insured against by the common form of English policies, have been held to be no ground of abandonment (x): so, the loss caused by detention or embargo laid on by the foreign government, of which the assured was a subject, was held at one time to be no ground of abandonment as against a British underwriter (y), a doctrine which, as we have seen, if not entirely relinquished in English law (z), was subsequently modified by the limitation, that loss so caused would give a right of abandonment, whenever it appeared, from the whole circumstances of the case, and the true construction of the policy, that it was a risk contemplated by the parties. (a)

On the same principle, loss caused by any peril, expressly or virtually excepted out of the policy, can give no right of abandonment; as where a ship, insured against "*sea-damage only*," is lost by capture. (b)

If, from the general doctrine of constructive total loss, we pass to an examination of the cases in which the question has been raised, in our jurisprudence, whether the right to give notice of abandonment has ever vested in the assured; or,

The doctrine of constructive total loss varies, as applied to the different subjects of insurance.

(w) Per Story, J. in *† Peele v. Merchants' Ins. Comp.* 3 Mason 27. 3 Kent's Comm. (5th ed.) 324. See also 2 Phillips on Ins. chap. xvii. sect. 14. "Whether an abandonment may be defeated by subsequent events," pp. 411-417.

(x) *Hadkinson v. Robinson*, 3 Bos. & Pull. 268. *Lubbock v. Rowcroft*, 5 Esp. 40. *Blackebagen v. London Ass. Comp.* 1 Camp. 454. *Parkin v. Tuane*, 11 East, 22. *Foster v. Christie*, *ibid.* 205.

(y) *Tontang v. Hubbard*, 3 Bos. & Pull. 291. *Conway v. Gray*, 10 East, 536. *Conway v. Forbes*, *ibid.* 539. *Minett v. Bonham*, 15 East, 477.

(z) *Flindt v. Scott*, 5 Tannt. 674. *Bazett v. Meyer*, *ibid.* 824.

(a) *Simeon v. Bazett*, 2 Maule & Sel. 98. *Campbell v. Innes*, 4 B. & Ald. 423.

(b) *† Rice v. Homer*, 12 Mass. Rep. 250, cited 2 Phillips on Ins. 248. < *Williams v. Smith*, 2 Caines, 20. > See also *S. P. Livie v. Jenson*, 12 East, 648.

¹ See ante, 983, 994, and cases in notes.

having vested, whether it has or has not been so far divested, by subsequent events, as to preclude him from ultimately recovering as for a total loss, we shall find some apparent confusion in the decisions, arising principally from a want of properly distinguishing the different effects of the doctrine *of constructive total loss, as applied to the different subjects of insurance: in order to avoid, as far as possible, this confusion, we will consider separately the cases of constructive total loss on the three main subjects of insurance,—*Ships, Goods, and Freight*.

General doctrine of constructive total loss.

* 1059

The difficulty, it will be seen, relates, not so much to the grounds of abandonment in the abstract, *i. e.* to the *kind of casualties which give the right to abandon*, (c) as to the application of general principles to the varying circumstances of each particular case, which must be the apology for a more lengthened citation of authorities than would be requisite under a more scientific and methodical system of law.

SECT. II. Cases of Constructive Total Loss on Ship.

ART. 1. In Cases of Capture, Arrest, Seizure by Mutinous Crew, Desertion at Sea, &c.

§ 378. The best general statement I have any where met with, of the circumstances which confer on the assured on ship a *prima facie* right to give notice of abandonment, is contained in the following passage from the judgment of Mr. Justice Story in the American case of *Peele v. The Merchants' Insurance Company*: (d) ¹ “The right of abandonment has been admitted to exist, where there is a forcible dispossession

Constructive total loss on ship—in cases of capture, arrest, seizure, desertion at sea, &c.

Enumeration of cases which give a *prima facie* right of abandonment on ship.

(c) The grounds of abandonment (*i. e.* cases of constructive total loss) contained in the following enumeration taken from the Code de Commerce, are all, *excepting the last*, admitted to be such in our law:—
1. Capture; 2. Shipwreck; 3. Stranding where the ship's timbers are broken (*embarquement avec bris*); 4. Innavigabil-
ity, produced by perils of the seas; 5. Detention by a foreign power; 6. Or by the home government; 7. *Loss or deterioration when amounting to three-fourths of the value of the thing insured.*
(d) 3 Mason's Rep. 27, cited 2 Phillips on Ins. 253.

¹ See the remarks of Mr. Justice Putnam, in reference to this case, in *Deblin v. Ocean Ins. Co.* 16 Pick. 310, 311.

Constructive total loss on ship—in cases of capture, arrest, seizure, desertion at sea, &c.

1060 *

Capture, *prima facie*, confers the right of giving immediate notice of abandonment.

or ouster of the owners of the ship, as in cases of *capture*, &c. ; — where there is a restraint or detention which deprives the owner of the free use of his ship, as in cases of *embargoes, blockades and arrests* ; — where there is a present total loss of the physical possession and use of the ship, as in *cases of *submersion* ; ¹ — where there is a total loss of the ship for the voyage, as in cases of *shipwreck*, so that the ship cannot be repaired in the port where the disaster happens ; — where the injury is so extensive, that by the reason of it the ship is useless, *and the making repairs would exceed her value.*"

We will consider the different cases somewhat in the above order : 1st, therefore the assured on the ship has a right to give notice of abandonment, immediately he hears that his ship has been forcibly taken out of his possession and control by capture ; for, from the moment of capture, he is deprived of the free disposal of his vessel, at all events, for a time, and perhaps for ever : (e) "The ship," as Lord Mansfield says, "is lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy." (f) Immediately, therefore, the assured receives intelligence that his ship is captured, he has a right *to give notice of abandonment*,² and he may insist on such notice, and recover as for a total loss, "*provided the capture, and the total loss occasioned thereby, continue to the time of bringing the action.*" (g)³

If, however, the ship, after such notice, but before action brought, be restored to her owners in an undamaged, or only partially damaged state, the assured cannot recover as for a total loss.

If, however, before action brought, the ship be re-captured and restored to the possession or control of her owners, either in an undamaged or only partially damaged state, the

(e) Emerigon, chap. xvi. sect. 2. vol. ii. p. 212. ed. 1827.

(f) In 2 Burr. 694.

(g) Per Lord Mansfield in *Hamilton v. Mendes*, 2 Burr. 1212.

¹ See *ante*, 1004.

² *Gardere v. Columbian Ins. Co.* 7 John. 514 ; *Bohlen v. Delaware Ins. Co.* 4 Binney, 430 ; *Munson v. New England Ins. Co.* 4 Mass. 88 ; *Dorr v. New England Ins. Co.* 11 Mass. 1 ; *Dorr v. Un. Ins. Co.* 8 Mass. 494 ; *Rhineland v. Ins. Co.* 4 Cranch, 29 ; *Lovering v. Mercantile Mar. Ins. Co.* 12 Pick. 348 ; *Delano v. Bedford Ins. Co.* 10 Mass. 347 ; *Brown v. Phoenix Ins. Co.* 4 Binney, 445. But the abandonment must be made before the cause of the loss is removed. *Tucker v. United Ins. Co.* 12 Mass. 268 ; *Amory v. Jones*, 6 Mass. 318 ; *Richardson v. Maine Ins. Co.* 6 Mass. 102 ; *Shaw, Ch. J.*, in *Lovering v. Mercantile Mar. Ins. Co.* 12 Pick. 348 ; *Queen v. Union Ins. Co.* 2 Wash. C. C. 331 ; *De Peau v. Russel*, 1 Brevard, 441.

³ See *De Peau v. Russel*, 1 Brevard, 441.

assured cannot insist on his notice of abandonment and recover as for a total loss, even though the loss was total at the time he gave such notice.

Constructive total loss on ship—in cases of capture, arrest, seizure, desertion at sea, &c.

The principle of the English law, in fact, is, as we have already seen, "*that the nature of the damnification at the time of action brought*¹ *is the sole criterion of the right to recover as for a total loss.*" (h)

The following case affords an illustration of this principle.

Insurance was effected on ship and goods on a voyage from *Virginia to London*: the ship on the voyage was captured on the 6th of May, and re-captured on the 23d: on the 3d of June she was brought into *Plymouth*. Twenty days after her arrival in *Plymouth*, the assured, who then first heard both of the capture and re-capture, gave notice of abandonment, which the underwriters refused to accept. On the 19th of August (*before action brought*) the ship and cargo were brought into the port of London. *The ship had received no damage from the capture, and the cargo was delivered to the freighters, who paid full freight.* Lord Mansfield held that upon the above facts, the assured could not recover as for a total loss (i): "*the plaintiff's demand,*" said his lordship, "*is for an indemnity. His action, then, must be founded on the nature of his damnification as it really was at the time of action brought.* It is repugnant on a contract of indemnity to recover as for a total loss when the final event has determined that the damnification is in truth an average loss." (j)

If a ship, after capture and re-capture, is restored, undamaged, before action brought, she cannot then be abandoned. *Hamilton v. Mendes*, 2 Burr. 1198.

* 1061

In this case, it will be observed, the assured *was aware of the ship's re-capture and restoration at the time he gave notice of abandonment*, so that neither the *supposed* nor the *real* state of facts was such as to justify the notice of abandonment at the time it was made; but even though the *supposed* state of facts was such as to justify the notice when given, that is, although the assured had, at that time, only heard of the capture, and not of the re-capture, yet the subsequent recapture and restoration of the ship in a compara-

Even though the supposed facts warranted the notice, when given, the subsequent restoration of the ship before action brought equally defeats the right to recover as for a total loss.

(h) Per Lord Ellenborough in 4 Maule & Sel. 583.

(i) *Hamilton v. Mendes*, 2 Burr. 1198.
(j) 2 Burr. 1210.

¹ At the time of the abandonment, in the United States. *Ansé*, 1037, 993, 994, and cases in notes.

Constructive total loss on ship — in cases of capture, arrest, seizure, desertion at sea, &c.

Bainbridge v. Neilson,
10 East, 329.

1062 *

And the rule is the same even where the capture, &c. continued at the time of giving notice of abandonment.

tively undamaged state, if before action brought, will equally prevent the assured from recovering as for a total loss. (*k*)

The following are the facts of the case by which this point was first established :—

Insurance was effected on *ship and freight* for a homeward voyage from Jamaica to *Liverpool* : the ship, in the course of the voyage, was captured on the 21st of September, and recaptured on the 25th ; the assured on the 30th, having then only received intelligence of the capture, *but not *of the recapture*, gave notice of abandonment, which the underwriters did not accept : afterwards, but *before action brought*, the ship was restored to the possession of the assured in an Irish port to which she had been carried ; and after the commencement of the action, but before the trial, she arrived at *Liverpool*, and earned freight. Neither ship nor goods were damaged ; but the salvage charges on the *ship* amounted to about 15l. per cent. on the sum insured, and on the *freight* to about 13l. per cent. — Lord Ellenborough and the Court of King's Bench, upon this state of facts, and on the principle above stated, unanimously held that the assured could only recover for an *average* loss. (*l*)

Subsequently, the courts, notwithstanding the doubts of Lord Eldon in *Smith v. Robertson* (*m*), gave a still further extension to the doctrine, and conclusively established that, even where the *real* state of facts was such as to justify an abandonment, at the time of giving notice, that is, though the capture was actually continuing at that time, yet subsequent re-capture and restoration, before action brought,¹ would defeat the claim for a total loss. (*n*)

(*k*) *Bainbridge v. Neilson*, 10 East, 329. *Parsons v. Scott*, 2 Taunt. 362. *Naylor v. Taylor*, 9 B. & Cr. 718.

(*l*) *Bainbridge v. Neilson*, 10 East, 329. See also *S. P. Naylor v. Taylor*, 9 B. & Cr. 718. 4 M. & Ryl. 526. S. C. at N. Pr. Dana. & Ll. 240.

(*m*) 2 Dow's Parl. Cases, 474. See the language of Lord Eldon at p. 482. of the report, in which his lordship protests "against being considered as giving an opinion agreeing or not agreeing with

these decisions" (*i. e.* *Hamilton v. Mendes*, *Bainbridge v. Neilson*;) and pretty plainly intimates that if the judgment of the House of Lords were given on this point, it would overrule that of *Bainbridge v. Neilson* : the case went off on the point that the notice, having been accepted, bound the rights of the parties. (*n*) *Patterson v. Ritchie*, 4 Maule & Sel. 393. *Brotherston v. Barber*, 5 Maule & Sel. 418, confirmed in *Naylor v. Taylor*, 9 B. & Cr. 724.

¹ Before abandonment, in the United States. *Ante*, 1060; in note, 993, 994, 1057.

The principle was first enforced in the following case : —

Goods were insured for a voyage from Liverpool to *Quebec* : on the 27th September, in the course of the voyage, the ship was captured, and was not re-captured till the 27th October ; in the interim, on the 13th of October, the assured, who then first heard of the capture, gave notice of abandonment, which the underwriters refused to accept : ultimately, and *before action brought*, the ship, with the goods on board, arrived at *Quebec*, and earned freight. The court held, on the above principle, that the assured could only recover for an average loss, to the extent of the sea damage and salvage charges on the goods. (o)

In this case, Lord Ellenborough said, "although Lord Eldon is stated to have spoken with dissatisfaction of *Bainbridge v. Neilson*, in the House of Lords, I confess, with all deference, I am unable to see any good reason for receding from that judgment;" and Mr. J. Bayley observed, "it appears to me that the plaintiff can only recover in respect of that which constituted a loss at the commencement of the action." (p) ¹

Constructive total loss on ship — in cases of capture, arrest, seizure, desertion at sea, &c.

Patterson v. Ritchie, 4 Maule & Sel. 393.

* 1063

§ 379. But as capture, though *prima facie* a total loss, does not necessarily amount thereto, so neither does recapture or restoration of the ship before action brought necessarily prevent the loss from being total : *if the ship, after the recapture, comes to the hands of the owner, and remains, at the time of bringing the action, in such a state that, even if no notice of abandonment had been previously given, yet the assured might, at that moment, have abandoned, he may recover as for a total loss, notwithstanding the existence of her mere hull.*²

But recapture or restoration of the ship before action brought does not necessarily prevent the assured from recovering as for a total loss : it will not have this effect if the state of the ship, at the time of action brought, was such as to entitle the assured, at that moment, to abandon.

(o) *Patterson v. Ritchie*, 4 Maule & Sel. 393. In this case, and in *Naylor v. Taylor*, the policy was on goods : but this makes no difference in cases of constructive total loss by capture, the principles of which are the same on all subjects of insurance alike.

(p) 4 Maule & Sel. 397 ; and see the passage from Lord Tenterden's judgment

in *Naylor v. Taylor*, 9 B. & Cr. 724, already cited, approving and confirming the rule of *Bainbridge v. Neilson*. In *Brotherton v. Barber*, Mr. J. Bayley seemed even to think it an open point whether the assured could recover as for a total loss, "if the loss, continuing total at time of action brought, became a partial loss only, at the time of the trial." 5 Maule & Sel. 424.

¹ See *ante*, 963, 1067.

² *Magoun v. N. Eng. Marine Ins. Co.* 1 Story, C. C. 157, cited *post*, 1072. If a captured ship be recaptured by a friend, the recapture takes away the right of aban-

Constructive total loss on ship—in cases of capture, arrest, seizure, desertion at sea, &c.

1064 *

What state of the restored ship at the time of action brought will entitle the assured either *them* to give notice of abandonment, or by virtue of a previous notice, to recover as for a total loss.

In cases on wager policies, the *loss of the voyage* was held to be the *loss of the ship*.

As far as concerns the *ship*, therefore, the question in all cases of capture, (or other forcible privation,) followed by recapture and restoration before action brought, comes to this: was the state of the ship after restoration, and at the time of commencing the action, such that the assured might, *at that time*, have treated the case as one of constructive total loss? if so, then he is entitled, notwithstanding such restoration, either to follow up a previous notice of abandonment, if any have been given, or, if he hears of the loss and restoration *at one and the same time, then, first, to give one, and, in either case, to recover as for a total loss.

The main difficulty has arisen in determining in what state the restored ship must be, so as either to entitle the assured, notwithstanding the restoration, to recover as for a total loss, or to preclude him from so doing on the ground of such restoration. In determining this question, there has been considerable fluctuation in the decisions, and especially, a great discrepancy between the earlier and the later authorities, the former of which must be now considered as to a great extent overruled. Lord Mansfield, in the decision of this point, gave great weight to a circumstance which, it is now settled, must be altogether left out of consideration in determining whether the loss on the ship is or is not constructively total,—viz. whether, in consequence of the casualty, there had or had not been a *loss of the voyage*: this arose, in all probability, from want of duly attending to the distinction between policies of insurance, as contracts of indemnity, and mere wagers in the form of policies, in which latter the *issue of the voyage* was the sole point upon which the result of the wager depended, and, therefore, the sole point to be attended to in determining, whether the sum staked on the venture was, or was not, demandable from the parties who had subscribed the wager-policy. Accordingly, in cases upon wager-policies, it had frequently been held that *capture, being an event which defeated the voyage*, gave the wagerers a right to recover as for a total loss, though the ship might be retaken after having been but a few days in possession of the

document as far as it depended on restraint and detention merely, and the right will then, as in the case of sea-damage, depend upon the degree of injury sustained in consequence of the capture. *Queen v. Union Ins. Co.* 2 Wash. C. C. 331.

captors, and subsequently restored to her owners before action brought, being liable only to a trifling claim for salvage. (q.)

The first reported case in which the point had to be determined *on an interest policy, was that of *Pole v. Fitzgerald*, which came before the Court of Exchequer Chamber in 1752 (on Error from the King's Bench): in this case, a privateer was insured in a valued policy, "*at and from Jamaica, for a cruise for four months from the 14th June, 1744,*" i. e. till the 14th of October: on the 23d of September the crew mutinied and deserted the ship, carrying away with them the boats, fire arms, and cutlasses, *by which means the voyage and cruise was wholly prevented and lost*: the ship herself, however, was brought safe to Jamaica, where she arrived on the 29th of September, and where she lay, in good safety at the time of action brought. Upon this state of facts, the Court of Error, reversing the decision of the court below, held that the assured on ship could not recover as for a total loss. (r) Chief J. Willes, in delivering the judgment of the Court of Error on this occasion, grounded their decision on the broad principle which may now be regarded as one of the landmarks of insurance law, that in all policies on ship (not being wagers) THE INSURANCE IS NOT ON THE VOYAGE, *but on the ship for the voyage*, and that, in all cases of loss under such policy, the question never is, *what damage has the assured sustained by the interruption of the voyage?* but, *how much damage is done to the ship?*¹

Constructive total loss on ship — in cases of capture, arrest, seizure, desertion at sea, &c.

* 1065

But in interest policies it was decided in the Exchequer Chamber and the House of Lords that the insurance was not *on the voyage*, but *on the ship for the voyage*: consequently that the mere loss of the voyage had nothing to do with the loss of the ship. *Fitzgerald v. Pole, Willes, 641; 5 Br. P. C. 131.*

(g) *De Paiba v. Ludlow*, Comyn's Rep. 360. *Pond v. King*, 1 Wils. 191. *Dean v. Dicker*, 2 Str. 200. *Whitehead v. Banco*, Park on Ins. 165. 8th ed. The cases of *Ansevedo v. Cambridge*, 10 Mod. 77, and *Spencer v. Franco*, before Lord Hardwicke, A. D. 1736, seem *contra*; but the former was never decided, and the latter turned mainly on another point. See these cases commented on by Lord Mansfield, 2 Burr. 695.

(r) *Pole v. Fitzgerald, Willes, 641*, confirmed in the House of Lords by eight judges against three; see *S. C. Fitzgerald v. Pole, 5 Brown's P. C. 131.*

¹ See *Rhineland v. Ins. Co. of Pennsylv.* 4 Cranch, 45; *Peele v. Merchants Ins. Co.* 3 Mason, 27, 67; *Alexander v. Baltimore Ins. Co.* 4 Cranch, 370; *Ritchie v. United Ins. Co.* 5 Serg. & Rawle, 501; *Bradlie v. Maryland Ins. Co.* 12 Peters, 400, 401; *Church v. Maine Ins. Co.* 1 Mason, 341; *King v. Hartford Ins. Co.* 1 Conn. 422. If a voyage is lost, in consequence of the ship being prevented from sailing by a squadron blockading the coast, it has been held, not to be such a loss of the voyage as gives a right of abandonment. *Patterson v. Marine Ins. Co.*, *Patterson v. Baltimore Ins. Co.* 5 Harr. & John. 417. Information given by a belligerent to a neutral vessel, that her port of destination is blockaded and a warning not to proceed thither, do not amount to a restraint or detention authorizing an abandonment. *Richardson v.*

Constructive total loss on ship—in cases of capture, arrest, seizure, desertion at sea, &c.

Lord Mansfield, however, reverted to the loss of the voyage as a test of the right to abandon a ship restored after capture and recapture. *Goss v. Withers*, 2 Burr. 683. A ship, after recapture, was brought into an English port too disabled to prosecute her voyage without expensive repairs, and liable for salvage to half her value: held a constructive total loss of ship, by reason of loss of voyage.

1066 *

State of the ship after the recapture.

It certainly seems remarkable that, after such an explicit declaration of this principle, it should have been so far lost sight of by Lord Mansfield, as it appears to have been, in most of the cases in which the same point presented itself for his decision, and which we have now to consider.

The first of these cases was *Goss v. Withers*, which was decided by his lordship in 1758—six years after the judgment of the Court of Exchequer Chamber in *Pole v. Fitzgerald*. In *Goss v. Withers* there were two policies, one on ship, and the other on cargo: the consideration of both is mixed up together throughout the case, and additional confusion *thereby introduced: we will confine our attention here to the policy on the ship. The ship was insured on a voyage from *Newfoundland* to a port of discharge in *Spain or Portugal*, whither she was bound with a cargo of fish: after sailing, she encountered a storm, by which she was separated from her convoy, and so disabled as to be incapable of proceeding on her voyage without repair: while in this state she was captured by the French, and all hands, except an apprentice and landsman, taken out of her: after remaining in the enemy's hands for eight days, she was re-captured, and necessarily brought into Milford Haven; upon which the assured, who then heard for the first, and at the same, time of the capture and re-capture, immediately gave notice of abandonment. The ship, as she lay in Milford Haven, was in such a disabled state that she could not prosecute her voyage without repairs, (the expense of which is not stated,) and the claim of the re-captors for salvage amounted to half her then value. Upon this state of facts, Lord Mansfield said, that the plaintiff's right to recover as for a total loss turned on the single question, whether, when the ship was brought into Milford Haven, the assured had, under all the circumstances, a right to abandon: his lordship held that he had, and decided accordingly. (s) ¹

(s) *Goss v. Withers*, 2 Burr. 683.

Maine F. & M. Ins. Co. 6 Mass. 102. The assured cannot abandon because his voyage is lost by an anticipation or fear, however reasonable, of a capture. *Amory v. Jones*, 6 Mass. 318; *Lee v. Gray*, 7 Mass. 349; *Cook v. Essex Ins. Co.* 6 Mass. 122; *Tucker v. United Ins. Co.* 12 Mass. 268; *Brewer v. Union Ins. Co.* 12 Mass. 170; *Corp v. United Ins. Co.* 8 John. 277; *Craig v. U. States Ins. Co.* 6 John. 226; *Messurier v. Union Ins. Co.* 1 Nott & M'Cord, 155; *Smith v. Universal Ins. Co.* 6 Wheaton, 176.

¹ See *Williams v. Suffolk Ins. Co.* 3 Sumner, 270, §10.

The following are the grounds of his lordship's judgment as to the ship :

"The loss and disability" (by the capture) "was, in its nature, total at the time it happened. The subsequent recapture is, at best, a saving only of a small part: half the value must be paid for salvage. *The disability to pursue the voyage still continued; the master and mariners were prisoners; the charter-party was dissolved; the freight (except in proportion to the goods saved) was lost.* The ship was necessarily brought into an English port: what could be saved might not be worth the expense attending it (which is proved by the plaintiff's offer to abandon);" and his lordship then states, in one sentence, the principle of his decision: "The *subsequent title to restitution, arising from the re-capture, at a great expense, of a ship disabled to pursue her voyage, cannot take away a right vested in the insured at the time of the capture." (t)

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Grounds on which Lord Mansfield based his decision.

* 1067

It seems clear, that the grounds thus stated by his lordship, would not now be held to support the affirmative of the issue on which he so correctly puts the decision of the case, — viz. whether the assured, when the ship was brought into the port of necessity, had a right to abandon: it seems equally clear from the passages printed in italics, that the ground on which his lordship mainly relied, was the *loss of the voyage*, which Chief Justice Willes, and the House of Lords, had already determined to have nothing to do with the *loss of the ship*.

Remarks on Goss v. Withers

The next case in order of time was *Hamilton v. Mendes* (u), which has been already considered, and in which his lordship found it necessary to qualify the generality of the terms he had employed in *Goss v. Withers*, but still refers to the loss of the voyage as a main element in his decision, saying, "in the present case *the voyage was so far from being lost*, that it had only met with a short temporary obstruction," &c.

Hamilton v. Mendes, 2 Burr. 1198.

(t) Ibid. 696. In relation to this passage Lord Tenterden on a subsequent occasion said, that "it was certainly too general, and that when Lord Mansfield said, 'that the right which an owner has to obtain restitution of ship and cargo, paying great salvage, may be abandoned

to the insurers,' that must mean, *such salvage as the assured has no reasonable means of paying.*" Per Lord Tenterden giving judgment in *Thornley v. Hebson*, 2 B. & Ald. 518.

(u) 2 Burr. 1198.

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Milles v. Fletcher, 1 Dougl. 231. A ship, after recapture, is carried into New York, and there left to be sold, because the expense of repairs would have exceeded her freight, or what she would have sold for in her home port: held a constructive total loss of ship by reason of a total loss of the voyage.

Question and grounds of decision, as stated by Lord Mansfield.

In the case of *Milles v. Fletcher* (v), where the point next arose, Lord Mansfield's judgment still mainly proceeded on the principle, that as the voyage or adventure contemplated was wholly lost, the ship might be considered as lost also: in this case the insurance was on *ship and freight* for a voyage from Montserrat to London: the ship in the course of the voyage, was captured by the French, but recaptured and brought into New York, then in possession of the British, *where the captain, who, with the crew, had been taken out of her by the captors, soon after arrived and took possession of her: at that time the state of the ship was as follows; she was leaky, and had lost all her rigging; her own crew was entirely gone, and no sailors could be had to navigate her; the salvage was high; the cost of repairs would have exceeded her freight: under these circumstances, the captain, who knew nothing of the insurance, acting *bonâ fide* and for the benefit of all concerned, left the ship to be sold where she lay, and, coming over to England, gave information of the above facts to the assured, who, having then heard, for the first time, both of the capture and all that followed, immediately gave notice of abandonment: Lord Mansfield told the jury at the trial, that if they were satisfied the captain had done what was best for the benefit of all concerned, they must find for a total loss.

On motion for a new trial, his lordship said, that the question in the case was, "singly this: whether the consequence of the capture were such, as, notwithstanding the recapture, *occasioned a total obstruction of the voyage or only a partial stoppage, as in the case of Hamilton v. Mendes.*" With regard to the ship, his lordship said, "It was certainly better to sell her, than bring her to London. There was no crew belonging to her, and she had no cargo. Even if all the cargo had been left, *the expense of repairs would have exceeded her freight.* If she had been brought home, the expense of bringing her might have been more than she would have sold for in London." — "The point is, what did the owner suffer by the capture; and it appears that he suffered so

much that it was not worth while to pursue the voyage. *The whole voyage was lost.*" (w)¹

This case may, perhaps, be supported on the ground that the ship was never, after the capture, restored to her owners at all, or never in such a state as to make it reasonable to expect, that they should take possession, instead of abandoning her; but it is clearly not on that ground, that it is put by *Lord Mansfield, but on the untenable position, that the ship was lost because the voyage was lost. (x)

Throughout the whole time that Lord Mansfield presided in the King's Bench, and indeed long afterwards, such seems to have been the recognized doctrine of the courts (y): one of the first cases in which a return was made (though not without some difficulty) to the doctrine of the House of Lords in *Fitzgerald v. Pole*, was that of *Parsons v. Scott*, which came before the Court of Common Pleas in 1810. In this case the insurance was on the ship for a voyage from Plymouth to Oporto and St. Ubes, there to load a cargo of salt, and thence return with it to London: while the ship was at Oporto, and before she could proceed to St. Ubes for a cargo of salt, according to her destination, she was seized by Marshal Soult at the head of the French forces, but subsequently ransomed by the master on payment of 3000 dollars as a *cartel ship* (that is, under an engagement that she should sail back to England in ballast, with a certain number of English prisoners, and thence return to Oporto into the custody of Soult, with a like number of French prisoners): the ship, which had been captured on the 29th of March, 1809, sailed from Oporto, under this contract, on the 19th of April, and arrived in Plymouth on the 13th of May: the plaintiff, who had given notice of abandonment on the 1st of

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Remarks on
Miles v.
Fletcher.

* 1069

The doctrine that the *loss of the voyage* is not the loss of the ship was revived in *Parsons v. Scott*, 2 Taunt. 363.

A ship brought back to this country as a *cartel ship*, so that the assured might have taken possession of her on paying the cartel money: held not a total loss of *ship*, though the *voyage* was wholly broken up.

(w) *Miles v. Fletcher*, 1 Dougl. 231.

(x) The case of *Manning v. Newsum*, 3 Dougl. 130, is put by Lord Mansfield on the same ground, though, as we shall elsewhere see, it may be supported on another.

(y) See *Camlet v. St. Barbe*, 1 T. Rep. 187, in which Buller, J. says "If either

the ship or the voyage be lost, that is a total loss. So again in *Rotch v. Edie*, 6 T. Rep. 413, (temp. Lord Kenyon,) in a case of abandonment on detention, the same doctrine was held: viz. that it was a total loss on ship, because the voyage was lost, and the whole adventure frustrated.

¹ *Williams v. Suffolk Ins. Co.* 3 Sumner, 270, 519; *Queen v. Union Ins. Co.* 2 Wash. C. C. 231.

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May (when he had heard of the capture, but not of the liberation of the ship,) claimed her from the master, who, however, refused to deliver her up except on payment of the 3000 dollars, which the plaintiff would not pay; and at the time of action brought she was still in possession of the master: the jury having found a verdict for the plaintiff as for a total loss, a motion was made to enter a nonsuit, on the *ground that the ship was not lost, for that she was destined to go to Portugal and come back again, and that she did go there, and did come back. The case was twice argued: on the first argument the court were still evidently entangled with the doctrine, that the loss of the voyage was the loss of the ship; but on the second the good sense of the matter prevailed, and they held that there was no total loss in this case, on the short, but satisfactory ground, "*that she had been detained, but was now safe.*" (z)¹

And re-affirmed by Lord Ellenborough in *Falkner v. Ritchie*, 2 M. & Sel. 290.

A ship, after seizure and desertion by her crew, is brought back to this country in a damaged, but not in an irreparable, state, and subject to a claim for salvage, held not a constructive total loss on ship, though a total loss of the voyage.

Four years afterwards the case of *Falkner v. Ritchie* was decided in the same way by the Court of King's Bench, then presided over by Lord Ellenborough: in this case the insurance was on ship for a bartering voyage, from Cadiz to the African coast, and thence back to Cadiz or Lisbon: after her arrival on the African coast, and while she was engaged in loading her return cargo, the master being on shore, the crew seized the ship, cut her cables, and sailed away with her to the coast of South America, where they deserted her, leaving only one black man on board: in this situation she was picked up by an English privateer, and brought to this country: immediately on her arrival here the assured, who then first heard of both her loss and recovery, gave notice of abandonment, which was not accepted: the ship at the time of action brought, lay in the port of London in possession of the owner of the privateer, from whom the assured might have had her, on paying him his claim for salvage. The state of the ship was this: part of her rigging was gone,

(s) *Parsons v. Scott*, 2 Taunt. 363.

¹ The redelivery of a vessel, which has been captured, to the assured, by order of the prize court, upon his giving bond either to restore the vessel in specie, or pay her value, in case of a condemnation, is no determination of the hostile detention. *Loving v. Mercantile Mar. Ins. Co.* 12 Pick. 348.

and she could not be made fit *for the voyage* again without considerable expense, and providing a crew and stores: the assured claimed a total loss, on the ground that the voyage had been wholly defeated, and relied upon the authority of *Goss v. Withers*: Lord Ellenborough, without calling on counsel on the other side, decided, that in this case a total loss could not be recovered. "As to *Goss v. Withers*," said his lordship, "there may be some doubt whether it is similar to the present case" (*i. e.* on its facts); "and I must say, *that there is a looseness and generality in the expressions, which have been borrowed in argument from that and the other case" (*Hamillon v. Mendes*), "which make one inclined to pause upon them. *What has loss of the voyage to do with the loss of the ship.* On this subject there is so much good sense in the judgment of Chief Justice Willes in *Pole v. Fitzgerald*, that it may be of great use to resort to it to purify the mind from these generalities." (a)

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Remarks of Lord Ellenborough on *Goss v. Withers*.

* 1071

From this period, then, the law may be considered as settled — and it is this: the loss of the voyage has nothing to do with the loss of the ship; but the assured on ship can never recover as for a total loss, unless, at the time of bringing the action, the ship is absolutely lost to him, as by capture or detention *continuing to that time*, or is only restored, in such a state, that the expense of making her available as a ship would exceed her value. (b)

The doctrine is now settled that the *loss of the voyage* has nothing to do with the *loss of the ship*.

The same principle has received abundant judicial illustration, and may be regarded as conclusively established, in the insurance law of the United States, where the courts have repeatedly laid it down, that, in order to give a right to abandon on any subject of insurance, there must be what amounts to a *constructive total loss on that subject itself*; and that the loss or breaking up of the *voyage* by the destruction or plunder of the cargo, or by the ship's being necessarily

The same doctrine prevails in the United States.

(a) *Falkner v. Ritchie*, 2 Maule & Sel. 290. See judgment of Lord Ellenborough, *ibid.* 293. The same principle is recognized and reaffirmed by Lord Eldon in *Brown v. Smith*, 1 Dow's P. C. 359: by Lord Tenterden in *Doyle v. Dallas* 1 Mood. & Rob. 55.

(b) See the admirable note to the case of *Naylor v. Taylor*, in *Danson & Lloyd's Reports*, from p. 243, to p. 254, of which I have largely availed myself in the preceding examination of the cases.

Constructive total loss on ship — in cases of capture, arrest, seizure, desertion at sea, &c.

1072*

The mere restoration, however, of the hull of the ship after capture and re-capture will not, *per se*, defeat a right of abandonment already vested and acted upon, nor preclude the assured from then giving such notice.

delayed for the purpose of repairs, has nothing whatever to do with the loss of the ship. (c)¹

§ 380. But, although it is thus established that the mere *loss of the voyage* is never, without more, a constructive total **loss of the ship*, it is equally certain that the mere restitution of the ship's hull before action brought, is not, *per se*, sufficient to defeat a notice of abandonment once rightfully made, and reduce a total to an average loss. "*No cases say that the bare restitution of the hull of the ship prevents the loss from being total.*" (d) "*The ship, after the recapture, must be in esse in the country of the owner, under such circumstances that he may, if he pleases, take possession of her, and may reasonably be expected to do so.*" (e)²

(c) † *Bradlie v. Maryland Ins. Comp.* See these cases cited and commented 12 Peters (S. C.) Rep. 400. † *Hurtin v. Phoenix Ins. Comp.* 1 Wash. C. C. Rep. 400. † *Alexander v. Baltimore Ins. Comp.* 4 Cranch Rep. 370. Ritchie v. United Ins. Co. 5 Serg. & R. 501. (d) Lord Mansfield in *Milles v. Fletcher*, Dougl. 232. (e) Mr. J. Bayley in *Holdsworth v. Wise*, 7 B. & Cr. 799.

¹ A ship on a sealing voyage visited the Falkland islands, where the master, with the second mate, and four of the best men, were captured by Lewis Vernet, acting governor of those islands. The ship itself was also seized, and, after being in the hands of the captors two or three days, was recaptured by the mate and part of the crew remaining on board, who brought her home and libelled her for salvage. On these events, it was decided by Mr. Justice Story, that there was a loss of the voyage from necessity, so that the underwriters were liable as for a constructive total loss. The learned judge said; — "I cannot treat this as the case of a voyage to a port of necessity for the mere purpose of new equipments and repairs to resume the voyage; but there was a total loss of the voyage itself. Besides, the vessel was liable to, and was libelled and sold for, salvage. That sale put an end at once to the original ownership and voyage; for, after the sale, it was utterly impossible to resume the voyage insured. New interests, new rights, and new parties had intervened. The necessary sale of a vessel, in the course of a voyage, to defray salvage, creates of itself a total loss of the vessel for the voyage; and in a case like the present, there was thereby a total loss of the voyage also as to the outfit insured." *Williams v. Suffolk Ins. Co.* 3 Sumner, 510. See *Alexander v. Baltimore Ins. Co.* 4 Cranch, 370; *Per Bronson, J., in Pezant v. National Ins. Co.* 15 Wendell, 457.

² A vessel was seized in a foreign port by the custom-house officers, for an alleged violation of the revenue laws, and, upon trial, the court affirmed that there was no justifiable ground for the seizure, and the vessel was restored. But, from long exposure in consequence of these proceedings, it was found, that she could not perform her voyage home without great repairs, amounting to more than her value. She was accordingly abandoned to the underwriters, and in an action against them the assured recovered for a total loss. *Magoun v. N. Eng. Marine Ins. Co.* 1 Story C. C. 157. See also *Lovering v. Mercantile Marine Ins. Co.* 12 Pick. 348.

The following cases have established and illustrate this principle:—

A ship, insured from Liverpool for a bartering voyage to the African coast, in the course of her passage out was captured by the French, who, after taking out her captain and most of her crew, and plundering her guns, stores, furniture, provisions, and register, gave her up in that state to the master of a Portuguese prize, which they had previously taken, and, at the same time, put on board of her again the English captain and part of the original crew. The ship being left at sea thus manned and very badly provisioned, the Portuguese captain bore up for Fayal, (Western Island,) and, on arriving there, claimed the ship, and what remained of the cargo, as a gift from the French captors: the English captain resisted this claim: the prize court of Fayal decided in his favor, subject to an appeal, pending which, by selling what remained of the cargo, and depositing the proceeds to abide the event of the appeal, he obtained the release of the ship, and arrived with her at Liverpool before action brought: the state of the ship, as she lay in port at Liverpool, was as follows: she was still in an entirely dismantled condition, but was worth to be sold as she lay 1300*l.* (her value in the policy was 3000*l.*); the expenses of bringing her from Fayal had been 221*l.*, the sum left there to abide the event of the appeal was 427*l.*; *the appeal was still pending, and, in the event of its being decided against the assured, he would have lost his deposit and *been condemned, besides, in damages to a much larger, and indefinite amount.* Under these circumstances the assured, who had given notice of abandonment, on first hearing of the capture and before the ship's liberation, insisted on his right to recover, in respect of such notice, as for a total loss; and the Court of King's Bench gave judgment in his favor. (f)

The main ground on which Lord Ellenborough rests his decision is this: "*The mere restitution of the hull of the ship, if the assured may eventually have to pay more for it than it is worth, is not a circumstance by which the totality of the loss is reducible to an average one.*" (g) "If no aban-

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A ship, after being captured and plundered of her stores, furniture, and register, is brought back to this country in a dismantled state, subject to the event of a still pending appeal: held that such restoration of the ship did not defeat the right of the assured, who had given due notice of abandonment, to recover for a total loss. *M'Iver v. Henderson*, 4 M. & Sel. 376.

* 1073

Ground of decision in this case.

(f) *M'Iver v. Henderson*, 4 Maule & Sel. 376. course of his judgment, referred to other considerations, which, as pointed out by

(g) Lord Ellenborough, indeed, in the very able annotator in *Dans. & Ll.*

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A ship, after being mutinously carried off by her crew, is brought into a colonial port, where her stores are sold (by strangers to the assured) to pay salvage, leaving only her *hull and rigging*: held a constructive total loss of ship.

Brown v. Smith, 1 Dow's P. C. 349.

1074*

A ship, after desertion by the crew, and notice of abandonment given by the assured, is carried into a foreign port, and there repaired on bottomry, *without any authority from the assured*: held that her being

donment had been already made," his lordship asks, "do not sufficient circumstances exist in this case to justify an original abandonment at the present moment?" and he concludes, "It appears to us that there existed at the time of the abandonment, at the time of action brought, and that there exist at the present moment, circumstances fully sufficient to entitle the plaintiff to recover as for a total loss."

A slave ship insured from Liverpool to the coast of Africa and thence to the West Indies was, in the course of her voyage, mutinously seized and run away with by her crew, but subsequently boarded and taken possession of by a British man-of-war, who brought her into Barbadoes. The government agent there, *in the absence of the master, and without waiting for orders from England*, sold the whole of the cargo and stores that still remained on board the ship, in order to pay the salvage, leaving nothing but the *hull and rigging*. The House of Lords held that, under these circumstances, the assured (who, immediately on hearing these facts, had given notice of abandonment and sent out orders to sell the ship) was entitled to recover as for a total loss. (h)

Nothing is said in this case as to the state of the ship; and the decision probably proceeded on the ground, that there had been no restoration of the ship to the country of the owners, within the terms of Mr. J. Bayley's judgment in the following case.

A ship, insured on a voyage from *Belfast* to her port or ports of loading in *British America*, and thence back to her port of discharge in the United Kingdom, after sailing on her homeward passage, received so much damage from tempestuous gales, that the crew, as the sole chance of saving their lives, abandoned her, and went on board of another vessel. Immediately on receiving intelligence of the ship's desertion by her crew, the plaintiff gave notice of abandonment: the day after the crew had left her, the ship was picked up at

252, show that his lordship had not quite "purified his mind of the generalities" that he reprobates, in *Falkner v. Ritchie*. Thus, in stating the condition of the ship at time of action brought, he says, *inter alia*, "*The voyage is lost, the cargo which was to be conveyed in the ship is wholly gone*;" and in another part of his judg-

ment he dwells on the fact that "*the voyage was completely lost*," (see 4 Maule & Sel. 584, 585,)—circumstances which, he had previously admitted, could have nothing to do with the loss of the ship.

(A) *Brown v. Smith*, 1 Dow's P. C. 349. Lord Eldon gave judgment.

sea by a third vessel, the captain of which put some men on board of her, and ultimately succeeded in bringing her into New York, where, on arrival, she was taken possession of by the British consul, and by his sanction, *but without any authority from the assured*, was repaired on bottomry by the agents for Lloyd's in that city: the ship, after being thus repaired, was brought over to Liverpool, where she arrived before action brought, but was immediately taken possession of on behalf of the lenders on the bottomry bond, whose claims amounted to 1200*l.* and was liable besides to an additional charge of 850*l.* for the estimated cost of repairing further damage received by her in the Mersey just before reaching Liverpool: the joint amount of these two sums exceeded the value in the policy. Under these circumstances the court held, that the loss which had once been total by the desertion of the crew, and in respect of which the assured had given due notice of abandonment, was not turned into a partial loss by the subsequent events, the effects of which could be of no benefit to the assured. (i)

*In this case it is important to observe, that the repairs abroad for which his ship was bottomried *had been done by strangers without the authority of the assured*; had they been done by his direction, or by the master acting as his agent at the foreign port, then the fact of the ship's arrival would, as it seems, have precluded a recovery for a total loss, though the amount of the bottomry bond and expenses had together exceeded the worth of the ship to her owners as restored. (j) ¹

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subsequently restored to her home port, before action brought, burdened with the bottomry lien, and a charge for repairs, together exceeding her insured value, did not reduce the total loss to an average. *Holdsworth v. Wise*, 7 B. & Cr. 794.

* 1075

Remarks on this case.

§ 381. It must, however, be carefully borne in mind, that, in order to give the assured even a *prima facie* right to abandon in respect of capture, seizure, desertion, or other privation of property or possession, whether forcible or not, there must have been, at some one period of time during the

In order, however, to vest a right of abandonment in respect of capture, seizure, desertion, &c. the owner must, at some one period during the risk, have been completely deprived of the possession and control of the ship.

(i) *Holdsworth v. Wise*, 7 B. & Cr. 794. S. C. 1 M. & Ryl. 673; and see the remarks, on this case, of Lord Tenterden in 9 B. & Cr. 416, and of Tindal C. J. in 6 M. & Gr. 811.

(j) See the judgment of the Court of Exchequer Chamber in *Chapman v. Benson*, overruling that of the Common Pleas in *Benson v. Chapman*, 6 M. & Gr. 792. See these cases considered hereafter.

¹ See *Lovring v. Mercantile Ins. Co.* 12 Pick. 348; *post*, 1112, 1114.

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risk, a total loss *by the complete and actual privation of the owner's possession or control over the ship*: if the legal possession of the ship by the owner have never, for any single point of time, been put an end to by the casualty in respect of which he abandons, he has no vested right of abandonment, and can never recover as for a total loss.

The following case is an illustration of this principle:—

A ship deserted by her own crew, is, at the same moment, taken possession of by salvors, who succeed in bringing her into a port in the owner's country, where, with the knowledge and assent of the latter, she is unnecessarily sold to pay the salvage: held that this loss, which had never been total as to the assured, was not made so by such sale. *Thorneley v. Hebson*, 2 B. & Ald. 513.

1076 *

Grounds of decision.

The ship *William*, belonging to Townshend and White, of New York, was insured on their behalf, in this country, for a voyage from *Hull* to *New York*: in the course of this voyage she met with such tempestuous weather, and, in consequence, became so leaky, that the crew, who were reduced to a state of sheer exhaustion by working the pumps, deserted her at sea, as the only possible means of saving their lives, and were taken on board the brig *Hyder Ali*, which had borne down to their assistance in the gale: *at the same time*, eight men of the *Hyder Ali's* crew, at the imminent hazard of their lives, offered, and were allowed to board the *William*, in the hopes of ultimately bringing her into port, and thereby entitling themselves to salvage. The *Hyder Ali*, with the *crew of the *William* on board, reached New York in safety, upon which Townshend and White, who resided there, immediately sent orders to their agents in England to give notice of abandonment to the underwriters, which was given accordingly, but not accepted: meanwhile, only two days after the *Hyder Ali's* arrival at New York, the *William* was brought, by the eight seamen who had boarded her, into Newport, Rhode Island, (a harbor about two hundred miles off,) and there, with the knowledge of Townshend and White, who did nothing to prevent the proceeding, was sold to pay the salvage, which amounted to about *two-thirds* of the price she sold for: the court, on the whole of the above circumstances, held, that the assured could not insist on his notice of abandonment, and recover as for a total loss; for, first, the ship had never effectually been lost to the assured at all, his right of possession and control over her never having, in fact, ceased; *for the eight seamen who boarded her as salvors must be regarded as his agents, and they had taken possession of her directly she was left by the original crew*: secondly, the ship was restored to Townshend and White, after notice of abandonment, under such circumstances, that they might

have had possession of her again, if they pleased, and might reasonably have been expected to take it; and they could not entitle themselves to recover as for a total loss, by permitting the salvors to have recourse to a sale, which, not being necessary, was not justifiable. (k)¹

Constructive total loss on ship — in cases of capture, arrest, seizure, desertion at sea, &c.

§ 382. The grounds of abandonment hitherto considered have been *capture, barratrous seizure, and carrying away of the ship by the crew (l), and desertion of the ship at sea by the crew, as the necessary and sole means of saving their lives (m)*: in all these cases we have seen that the assured has a vested right to give notice of abandonment on first hearing of the *casualty, supposing the privation of his possession or control over the ship to have been once total; but that his right to recover, as for a total loss, depends, in all cases alike, upon the state of the ship at the commencement of the action.² Subject to the same limitations, there can be no doubt that *arrest, detention, or embargo* of the ship, whether by a hostile or friendly government, gives a *prima facie* right of abandonment in all cases where there is an apparent probability that the owner's loss of the free use and disposal of his ship, once total, by the arrest or embargo, *may be of long, or, at all events, of very uncertain continuance.* (n)³

Arrest, detention, or embargo, is a ground of abandonment, where likely to be of long or uncertain duration.

* 1077

Thus, where the ship of an American merchant, resident, at time of action brought, in this country, had been seized and detained by the French government *in their port of loading*, it was held, that under a policy, *at and from* such port, he might recover as for a total loss, upon due notice of abandonment, more especially as it appeared that the ships, at the

Rotch v. Edie, 6 T. Rep. 413.

(k) *Thorneley v. Hebeon*, 2 B. & Ald. 513.

(l) *Falkner v. Ritchie*, 2 Maule & Sel. 290. *Brown v. Smith*, 1 Dow's P. C. 349.

(m) *Thorneley v. Hebeon*, 2 B. & Ald. 513. *Holdsworth v. Wise*, 7 B. & Cr. 794. 1 M. & Ry. 673.

(n) Admitted by Lord Holt in *Green v. Young*, 2 Ld. Raym. 240, and by Lord Mansfield in *Goss v. Withers*, 2 Burr. 696. See also 6 T. Rep. 425, and 3 Kent's Comm. (5th ed.) 291. { *Odlin v. Pennsylvania Ins. Co.* 2 Wash. C. C. 312. *Delano v. Bedford Ins. Co.* 10 Mass. 347. *M'Bride v. Marine Ins. Co.* 5 John. 299. }

¹ See *Williams v. Suffolk Ins. Co.* 3 Sumner, 510, cited post, 1082.

² At the time of the abandonment in the United States, *ante*, 993, 1057, and in notes.

³ See *ante*, 1060, and cases in note, 1065, in note.

Constructive total loss on ship—in cases of capture, arrest, seizure, desertion at sea, &c.

If the arrest be only of very short duration, it is no ground for abandonment.

1078 *

In France certain delays are required.

Other foreign laws.

In this country arrest, detention, &c. confer an *immediate* right to give notice of abandonment.

time of action brought, were still detained, and had then been so for three years. (o)

Of course, if the arrest be only momentary in its duration, if it creates only a temporary obstruction of the *voyage*, without giving rise to any permanent loss of control over the *ship*, it cannot give any right to abandon. Thus, where, on the occasion of a famine at Corfu, some Venetian cruisers, meeting at sea a Genoese ship, laden with corn, carried her into Corfu, and, after taking out and paying for the corn, let the ship go free, this was decided, in the Rota court of Genoa, to give no ground of abandonment to the assured on ship. (p) So, where a British ship was detained eleven days by a British man-of-war, to prevent her proceeding to a port where an embargo was laid on all British vessels, it was held that the assured on ship could not abandon on this ground. (q)

*In France the assured is allowed to give notice of abandonment immediately after *capture*; but, in case of detention by arrest or embargo, he is obliged to wait before doing so for different periods fixed by the 387th article of the Code de Commerce: (r) "Other laws," says Mr. Benecké, "make no distinction between capture and detention. Those of Prussia admit the abandonment when the liberation is uncertain or tedious. In Genoa and Leghorn the assured may abandon when ship has been detained for three days. In Hamburg the assured cannot claim a total loss, until the ship or goods have been definitely condemned or irretrievably lost." (s)

In this country no precise period is fixed; but *immediately* on hearing that his ship is detained by an embargo, the assured may give notice of abandonment, subject, of course, as in all other like cases, to have his right to recover for a total loss defeated, by the restoration of the ship before action brought. (t) ¹

§ 383. In some of these cases of capture, seizure, and

(o) *Rotch v. Edie*, 6 T. Rep. 413.

(p) *Roccus*, No. 90, cited by Emerigon, chap. xii. sect. 30, vol. i. p. 327, ed. 1827; and see Boulay-Paty's commentary vol. ii. p. 219.

(q) *Foster v. Christie*, 11 East, 205.

(r) See Code de Comm. art. 387.

(s) Benecké, *Pr. of Indem.* 349.

(t) See 6 T. R. 425.

¹ Before *abandonment* in the United States. *Ans.* 993, 1057, and in notes.

arrest, a question has been raised as to the effect of a repurchase of the ship by the master, upon the right of the assured to recover as for a total loss. And the doctrine here appears to be, that where the property in the ship has never been divested out of the owners by lawful condemnation, and the ship, after being legally repurchased by the master, acting *bonâ fide* and justifiably for their benefit, is brought back to this country under such circumstances, that the owners may, if they please, take possession of her, on payment of the amount of repurchase money, and of any sums that may have been expended abroad in repairing her, they cannot, by refusing to do so, entitle themselves to recover as for a total loss; at all events, in cases where they have given no notice of abandonment, nor even, as it should seem, where they have.

Thus, where a ship, after condemnation by a French consul in a neutral port, (which, being illegal, effects no change on the property, was lawfully repurchased by the master on account of the owners, and, after being repaired abroad, brought back by him to this country, before the commencement of the action: Lord Kenyon held, that the plaintiff, who refused to pay the amount of the repurchase money and the cost of the repairs abroad, could not thereby entitle himself to recover a total loss, at all events, as he had given no notice of abandonment, but that he had only a right to recover an average loss, to the amount of the sum spent in the repairs and repurchase (u): the same decision was given in a case where the master, acting for the benefit of his owners, had repurchased, and repaired on bottomry, a ship which had been seized in Pillau (her port of discharge) by the Prussian government, under the Berlin decree, and there put up to sale at public auction: the master in this case, after repairing, had navigated the ship safely home, where the owners might have had her on paying the amount of the bottomry bond, but they, declining to interfere, allowed her to be sold to satisfy the bond, and then, without having given notice of abandonment, claimed a total loss: the court, however, said, that, as in this case there had been an unlicensed seizure, and the master had purchased the vessel of those who had no

Constructive total loss on ship — in cases of capture, arrest, seizure, desertion at sea, &c.

Effect of repurchase of ship by the master after capture and (illegal) condemnation.

*1079

Ship is bought in by the master, on account of owners, after an illegal condemnation, and restored to this country before action brought: held only an average loss. *M'Masters v. Schoolbred*, 1 Esp. 238. Same decision where ship, after the like repurchase, is brought back, subject to a bottomry lien for repairs done by the master's orders abroad. *Wilson v. Foster*, 6 Taunt. 25; 1 Marsh. Rep. 425.

(u) *M'Masters v. Schoolbred*, 1 Esp. 238.

Constructive total loss on ship—in cases of capture, arrest, seizure, desertion at sea, &c.

Doctrine in the United States as to the effect of repurchase by the master.

right to condemn her, the assured were entitled to take possession of her, on paying the expenses incurred in the repurchase and repairs, and that those expenses accordingly were all they were entitled to recover from the underwriters. (v)

Several cases have been decided in the United States as to the effect of such repurchase on the rights of the parties, where notice of abandonment has been given before the sale in fact took place: the result of those authorities appears to be, that the master in repurchasing is to be regarded as the agent of the owners, before notice of abandonment, and then, after it, as the agent of the underwriters. (w)¹

* 1080

ART. 2. *Cases of Innavigability by Sea Perils, where Repair is impracticable, or the Cost thereof would exceed the repaired Value, — Right of Master to sell the Ship.*

Cases of innavigability: where repair is impracticable, or would cost more than the repaired value, — right of master to sell.

§ 384. Where the ship is totally wrecked in the course of the voyage, — *i. e.* completely broken up by the perils insured

(v) *Wilson v. Forster*, 6 Taunt. 25. 1 Marsh. Rep. 425.

(w) See these cases collected, 2 Phillips on Ins. 439–419; and see *post*.

¹ "Upon a valid abandonment," says Mr. Chancellor Kent, "the master becomes the agent of the insurer, and the insured is not bound by his subsequent acts unless he adopts them. The owner or insured, equally with the master, becomes the agent of the insurer on abandonment, and he cannot purchase in the property on his own account, without the consent of his principals; and if he does, it revokes the abandonment, and turns the total into a partial loss. *Robertson v. Western M. & F. Ins. Co.* 19 Louis. R. 227. In cases of capture he is bound, if a neutral, to remain and assert his claim until condemnation, or the recovery be hopeless. *Marshall v. Union Ins. Co.* 2 Wash. C. C. 452. The duty of the mariners is the same. *The Saratoga*, 2 Gallison, 164; *Brown v. Lull*, 2 Sumner, 443. The wages of the master, and those of the crew, are a charge on the owner, and ultimately, in case of recovery, to be borne as a general average by all parties in interest; and if the abandonment be accepted, the underwriter becomes owner for the voyage, and in that character liable for the seaman's wages, and entitled to the freight subsequently earned. *Hammond v. Essex Fire & Mar. Ins. Co.* 4 Mason, 196. If the master purchases in the vessel, or ransoms her, the insurer will be entitled to the benefit of the purchase or composition; and, on the other hand, if the insured affirms the purchase of the master, it will be, at the option of the insurer, a waiver of the abandonment. The insurer can accept of the repurchase of the master, as his constructive agent, and affirm the act, or he may leave it to fall upon the master." 3 Kent, (5th ed.) 331, 332; *Saidler v. Church*, cited in 2 Caines, R. 286; *United Ins. Co. v. Robinson*, 2 Caines, R. 280; *Jumel v. Marine Ins. Co.* 7 John. 412; *Willard v. Dorr*, 3 Mason, 161; *Dederer v. Delaware Ins. Co.* 2 Wash. C. C. 61; *Bryant v. Commonwealth Ins. Co.* 6 Pick. 131; *Center v. Amer. Ins. Co.* 7 Cowen, 564; *Columbian Ins. Co. v. Ashby*, 4 Peters, (S. C.) 139; *Gardere v. Col. Ins. Co.* 7 John. 514; *Clarkson v. Phoenix Ins. Co.* 9 John. 1; *Miller v. De Peyster*, 2 Caines, 301; *Smith v. Touro*, 14 Mass. 112.

against, so that her hull is dismembered, and her planks and timbers scattered on the sea, — this, as we have already seen, gives the assured a right to recover as for a total loss, without notice of abandonment, and, *a fortiori*, would entitle him so to recover where notice of abandonment has actually been given: the case is the same where, although the ship's timbers hold together, so that she retains the shape of her hull, she is yet so shattered as to be reduced to a mere mass of materials, or "congeries of planks," so that she would require *reconstruction* rather than repair, to make her a sea-going ship again. (x)

There are however intermediate cases: a ship may be stranded or driven ashore without this extreme amount of absolute disability being at once produced, and yet under circumstances which make the chances of her being ultimately extricated from the peril, at all, exceedingly precarious; or the probable expense of so extricating and repairing her as to be able to keep the sea, as a ship, greater than would be justified by her estimated value when repaired.

Considerable difficulty has been experienced in discovering a practical test by which to ascertain when the assured on ship in such cases shall be entitled to recover as for a constructive total loss. The point, however, in our own law may now be considered as fixed with tolerable certainty by a long course of judicial decisions, of which the result may be expressed in the two following propositions.

First; if, by the perils of the seas, the ship be so damaged *as to be incapable of proceeding on her voyage, or keeping the sea without repairs, at a place where such repairs cannot be procured, — either from want of materials, or from the master's total inability, after using his best exertions, to obtain either money or credit for the purpose of raising funds to repair — that is a case of constructive total loss on ship.¹

Cases of innavigability: where repair is impracticable, or would cost more than the repaired value, — right of master to sell.

Where the ship is wrecked in pieces, or reduced to a mere congeries of planks, the loss is total without notice of abandonment.

Where wrecked or stranded without this extreme amount of absolute disability, the loss is only constructively total.

Principles of constructive total loss in such cases.

*1081

(x) *Cambridge v. Anderton*, 2 B. & Cr. 691. 4 Dowl. & Ry. 203. *Allen v. Suptay*, Cours de Croit Comm. Mar. tom. grue, 8 B. & Cr. 561. 3 M. & Ry. 9. *iv. p. 231*, ed. 1834. The law is the same in France.

¹ *Peele v. Merchants Ins. Co.* 3 Mason, 27; 4 Oranch, 45; *Bradlie v. Maryland Ins. Co.* 12 Peters, (S. C.) 400; *Wood v. Lincoln and Kennebec Ins. Co.* 6 Mass. 479; *Patrick v. Com. Ins. Co.* 11 John. 13; *King v. Middletown Ins. Co.* 1 Conn. 184; *Church v. Marine Ins. Co.* 1 Mason, 341; *Sewall v. U. S. Ins. Co.* 11 Pick. 90; *Abbott v. Broome*, 1 Caines, 292.

Cases of innavigability: where repair is impracticable, or would cost more than the repaired value, — right of master to sell.

In such cases the law also vests in the master a power to sell the ship.

Hence, the question whether the loss on ship is constructively total by reason of sea-damage, often turns on the point, whether the sale by the master was justified under the circumstances.

1082 *

Secondly; the case is the same when the ship, by the like perils, is driven ashore, or otherwise placed in a position of imminent hazard,¹ and, by reason of the casualty, reduced to such a state of innavigability, that a prudent owner, if uninsured and on the spot, would, in the exercise of the best and soundest judgment that could be formed under the circumstances, rather sell her, as she lay, than attempt to repair her, either because there is no reasonable probability of her ever being delivered from the peril at all, or because the expense of repairing her, so as to be capable of keeping the sea as a ship again, would exceed her value when repaired.²

It will be observed, that in these cases of extreme emergency and urgent necessity, when the conduct of the adventure to a safe termination, as to the ship, becomes hopeless, and no prospect remains of bringing her home, the law has vested a power in the master to do the best for all concerned, and, consequently, to sell or otherwise dispose of her for their benefit.³

Accordingly, we shall find that in many — in fact, in most — of the cases where the question has arisen as to the right of the assured on ship, in respect of such casualties, to recover as for a total loss, the master has, in fact, exercised this power by selling the ship abroad, and the assured has given notice of abandonment on first receiving intimation, at one and the same time, of the casualty and the sale. In such cases the question, whether the circumstances amounted to a constructive total loss on ship, has very generally been made to turn on the point, whether the sale by the master was or was not justified by the urgent necessity of the case, it being clear law, that, wherever the circumstances are such as to justify the master in selling, they amount to a constructive *total loss, in respect of which the assured, on giving notice of abandonment, may recover from the underwriters the whole amount of the insurance. (y) ⁴

(y) See this doctrine stated by Lord Mansfield, *Miles v. Fletcher*. 1 Dougl. 232, and by Mr. J. Buller in *Plantamour v. Staples*, 1 T. R. 611. "Whatever,"

says Lord Mansfield, "it was right for the captain to have done, if it was his own ship and cargo, the underwriters must answer the consequences of."

¹ The assured cannot abandon on the ground of imminent danger of a total loss. *Hall v. Franklin Ins. Co.* 9 Pick. 466.

² *Post*, 1066.

³ *Ante*, 183, et seq. and notes.

⁴ Where a sale of a vessel, in the course of a voyage, is rendered necessary in order

It must, however, in all these cases, be most carefully borne in mind, that the sole point to be attended to in ascertaining whether the circumstances are such as to entitle the assured to abandon and recover as for a total loss, is *not the mere fact of a sale by the master, but the state to which the ship was reduced by the perils insured against, which justified that sale on the ground of necessity.* The mere fact of sale itself, irrespective of the state of the ship, which made it necessary, can give the assured no right to abandon: "there is no such head of insurance law as loss by sale." (z) ¹

The assured, in fact, abandons, as it is well expressed by Mr. Phillips, "*not because the sale has given the right, but because the events which induced the sale had occasioned a total loss.*" (a) ²

Accordingly, as we shall presently see, although no sale has intervened before notice of the loss, but either the assured himself has given orders to sell *after* receiving intelligence of the casualty and giving notice of abandonment (b), or the ship has remained unsold at the time of action brought (c), the loss is equally total in construction of law, if the cost of repairing the ship, so as to be fit for navigating the seas again, will exceed her value when repaired.

Bearing these principles in mind, we will proceed to consider the cases in which the question has been raised as to the right of the assured to abandon and recover as for a total loss in respect of the innavigability of the ship, whether sold by the master abroad before notice of loss, or remaining unsold at time of abandonment, or at time of action brought.

*§ 385. *First*, then, the assured on ship may give notice of abandonment, and recover as for a total loss, whenever his

(z) Per Bayley, J. 1 Mood. & Rob. 117.

(a) 2 Phillips on Ins. 296.

(b) Allen v. Sagrue, 8 B. & Cr. 561. 3 M. & Ry. 9.

(c) Young v. Turing, 3 Man. & Gr. 593. 2 Scott, N. R. 752. Mannig v. Irving, 1 C. B. 168. 2 C. B. 784. S. C.

Dom. Proc. July 26, 1847.

Cases of innavigability: where repair is impracticable, or would cost more than the repaired value, — right of master to sell.

But in all these cases that which gives the right to abandon is not the mere fact of sale by the master, but the previous state of the ship, which justified the sale.

There is equally a constructive total loss where there has been no sale before notice of abandonment.

* 1083

If a ship, after going ashore, be so damaged that she cannot be repaired, so as to keep the sea again, from want of materials, or the impossibility of procuring money or credit at the place of the casualty, — this is a constructive total loss on ship.

to defray salvage, this of itself is held to create a total loss of the vessel for the voyage. Williams v. Suffolk Ins. Co. 3 Sumner, 510, cited *ante*, 1071, in note.

¹ See *ante*, 1010, 1011, and note.

² See American Ins. Co. v. Center, 4 Wendell, 45; American Ins. Co. v. Ogden, 15 Wendell, 532.

Cases of innavigability: where repair is impracticable, or would cost more than the repaired value, — right of master to sell.

ship has, by the perils insured against, been reduced to such a state that she cannot keep the sea without repairs, and yet cannot be so repaired where she lies, either from want of materials and conveniences for repair, or from the total inability of the master to procure either money or credit for the purpose of repairing.¹

Valin says, that the assured on ship has a clear right to abandon, if, in the place where the ship goes ashore, or in its neighborhood, there are neither materials nor workmen for the repairs: the same right, he says, also attaches where, though materials and workmen can be found, yet the master has no means of raising funds to pay for the repairs. (d)

"If the master," says Chief Justice Tindal, "has no means of getting the repairs done in the place where the injury occurs, or if, being in a place where they might be done, he has no money in his possession, and is not able to raise any, then he is justified in selling, as the best thing that can be done; (e)² and the loss on the ship will in all such cases be constructively total.

The captain of an East India ship, driven back to Calcutta in a disabled state, and incapable of keeping the sea without extensive repairs, sells her there, because he cannot raise money for the repairs, by hypothecating the ship: sale held justifiable, and loss constructively total.

Read v. Bonham, 3 B. & Bingh. 147.

1084 *

It is upon the above principles that the following case appears to have been decided: — A ship, insured from London to the East Indies and back, at the outset of her *homeward* voyage was so damaged, by the perils of the seas, that the captain was forced to put back to *Calcutta* for repairs: on arriving there several surveys were had, all of which, except one, were attended, at the captain's request, by the official surveyor appointed by Lloyd's agents: by these surveys it appeared that the ship was greatly shattered, and that to repair her would cost 5000*l.* (she was valued in the policy at 8000*l.*:) the agents for Lloyd's, who had refused *to accept from the captain a notice of abandonment, equally declined to authorize the ship's being repaired: under these circumstances the captain, having in vain sought for advice

(d) Valin, Comment. sur l'Ordonnance de la Marine, vol. ii. pp. 345-347, ed. 1828. Pothier, No. 120, pp. 181-185, ed. par Estrangin, 1810. Boulay-Paty, Cours de Droit Mar. tom. iv. p. 278, ed. 1834. (e) Per Tindal, C. J. 4 C. & P. 283. See also the remarks of Lord Stowell in the *Fanny* and *Elmira*, 1 Edw. 117.

¹ See the cases cited in note to *ante*, p. 1081.

² *Ante*, 189 to 195, and in notes.

from three of the most respectable houses in Calcutta, and have failed in procuring the advance of any money on the hypothecation of the *ship* (though he was offered it on the terms of also hypothecating the *cargo*,) sold the ship in Calcutta for 1200*l.*: at the trial he swore that he had no money to go on with the repairs; that if the ship had been his own he should have pursued the same course; *and that to have repaired her in the shattered state she then was would have been an act of madness.* Upon this evidence the jury found that there was a justifiable cause for selling the ship; and the plaintiff who had given a notice of abandonment, which the court afterwards held sufficient, had a verdict for a total loss. On motion for a new trial, the majority of the court (Dallas, C. J., Park, J., and Burrough, J.) refused the rule; Mr. J. Park saying, the verdict was clearly right, "for a case of stronger necessity to justify the sale of a ship has seldom been made out. *The captain could not procure money for repairs, and it was not to be expected he should let the ship rot.*" Mr. J. Richardson dissented from the rest of the court, on the ground that the facts did not disclose any justifying necessity for a sale. "There was, it is true," said the learned judge, "*some difficulty* as to raising money, Calcutta being an expensive, though a good place for repairs, and the captain attempted, without success, to borrow on hypothecation of the ship, but he never offered to hypothecate the cargo as he might have done. It appears a strong thing to say that he would have sold for 1200*l.* if he had been uninsured." (f) There certainly seems great weight in these remarks of the learned judge, as applied to the circumstances of the particular case, the value of which, as an authority, rather depends on the principle it recognizes, than on the application of that principle to facts.

*But the mere fact that the expense of repairs and the rate of bottomry interest is extravagantly high at the place where the ship is driven ashore, will not give the master a right to sell, nor the assured, on abandonment, to recover as for a total loss: in such cases an abandonment and sale can only be justified upon clear evidence that the cost of repairs, so as

Cases of innavigability: where repair is impracticable, or would cost more than the repaired value, — right of master to sell.

Judgment of Mr. J. Richardson.

Remarks on this case.

*1085

The mere fact that the expense of repairs and rate of bottomry interest is extravagantly high at the place of the casualty, will not justify a sale.

(f) *Read v. Bonham*, 2 Brod. & Bingh. son, *ibid.* 156. See also S. C. 6 Moore, 147. See the judgment of Mr. J. Richardson, 397.

Cases of innavigability: where repair is impracticable, or would cost more than the repaired value, — right of master to sell.

Nor will a mere difficulty in procuring materials.

Furneaux v. Bradley, Park on Ins. 365.

to make the ship fit for the sea again, would have exceeded her value when repaired. (g)¹

A fortiori, the mere fact that there is a *difficulty in procuring materials* for repair will not justify the master in selling, nor entitle the assured, on abandonment, to recover as for a total loss, where the ship is not irreparably damaged, or not so damaged that the cost of repairs would exceed her repaired value.

A ship, insured for six months, from July, 1777, and bound from Cork to Quebec, was, on arrival at the latter place, removed into the basin for the winter, but before the expiration of the six months was driven thence by the force of the drift ice, and run upon the rocks. This was in November, and the condition of the ship could not be ascertained till the next spring, when, on survey, she was found to be bulged and much injured, but not *irreparably so*. In consequence of the *difficulty of obtaining materials for the repairs*, the master sold her where she lay. The court, on these facts, unanimously held that the assured could not recover as for a total loss. (h)

If the master's want of means to get the ship repaired arise from the fault of the agents or correspondents of the assured, his inability to repair will not justify a sale, nor entitle the assured to recover as for a total loss.²

A West Indian ship, insured from London to St. Thomas, had struck upon some sunken rocks just off the harbor of the latter place, but was got off and brought into port there, so much damaged that she could not be safely navigated on another voyage without being hove down and repaired: the means for making these repairs existed at St. Thomas, but, owing to the negligence of the agents of the assured there resident, and the misconduct of the local authorities, who twice condemned the ship after two imperfect surveys, these

(g) *Somes v. Sugrue*, 4 C. & P. 474. (both the latter cases were on sale of goods, as to which, see next section.)
See also *S. P. Morris v. Robinson*, 3 B. & Cr. 196. 5 Dowl. & Ry. 35. *Cannan* (h) *Furneaux v. Bradley, Park on Ins. v. Meaburn*, 1 Bingham 243. 8 Moore, 127, 365, 8th ed. *Ante*, 192.

¹ See *Pierce v. Ocean Ins. Co.* 18 Pick. 63.

² *American Ins. Co. v. Ogden*, 19 Wendell, 267; *S. C.* 15 Wendell, 539.

If the master's want of means to get the ship repaired arise from the fault of the agents or correspondents of the assured, his consequent sale of the ship will not entitle the assured to recover as for a total loss.

Tanner v. Bennett, Ry. & Mood. 182.

* 1086

repairs were not done, and the master, who tried to sell her as a ship, being unable to find any bidders, and being ordered to tow her out of the harbor, ultimately broke her up, and sold her for firewood: Lord Tenterden, on this evidence, told the jury that if the ship might have been repaired but for the negligence of the agents of the assured, the plaintiff could not recover as for a total loss: the jury accordingly found that only an average loss had been sustained; and as there was no evidence to what amount, they, under his lordship's direction, found for the plaintiff, with nominal damages only. (i)

Cases of innavigability: where repair is impracticable, or would cost more than the repaired value, — right of master to sell.

§ 386. *Secondly*, where the ship, by the perils insured against, is reduced to such a state of innavigability that a prudent owner, if on the spot and uninsured, in the exercise of the best and soundest judgment that could be formed under the circumstances, and acting for the benefit of all concerned, would rather sell her as she lies than attempt to extricate or repair her, either because there is no reasonable chance of ever extricating her from the peril at all, or because the cost of repairing her, so as to make her a navigable ship again, would exceed her value when repaired, this amounts to a case of urgent necessity, which will justify the master in selling, and to a case of constructive total loss, which will entitle the assured, on abandonment, to recover the whole amount of the insurance.¹ Such is the doctrine derivable

Where there is no reasonable hope of extricating the ship from the peril at all, or where the estimated cost of repairs will exceed the ship's value when repaired, the master will be justified in selling, and the assured may abandon and recover as for a total loss.

(i) *Tanner v. Bennett, Ry. & Mood.* cited, there appears to have been no 182. In this case, and that last before notice of abandonment.

Doctrine as stated by Mr. Chief Justice Tindal in *Somes v. Sugrue*.

¹ See *Robinson v. Commonwealth Ins. Co.* 3 Sumner, 220, 226, 227; *ante*, 189 to 196, where the cases illustrating this point will be found cited. In the case of *Scull v. Bridle*, 2 Wash. C. C. 150, Mr. Justice Washington held, that in cases of extreme necessity the master may sell in a *foreign country*, rather than let the property perish, but not in the country where his owner lives. This was held in the case of a sale of the materials of a wrecked vessel, which there was no immediate necessity of selling, but which might have been stored in a place of safety. But in *The Brig Sarah Ann*, 2 Sumner, 215, Mr. Justice Story, holding a contrary doctrine, remarked, that "if such an urgent necessity does exist, as renders every delay highly perilous, or ruinous to the interests of all concerned, the duty of the master is the same, whether the vessel be stranded on the home shore or on a foreign shore, whether the owner's residence be near, or be at a distance. I am aware of the doctrine maintained by my brother, the late Mr. Justice Washington, in *Scull v. Bridle*, 2 Wash. C. C. 150; and, unless it is to be received with the qualifications above stated, I cannot assent to it." This opinion of Mr. Justice Story has been affirmed by the Supreme Court of

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from the cases — a doctrine that has nowhere been better expressed than by Chief J. Tindal in the course of his charge to the jury in the case of *Somes v. Sugrue*. “If,” said that *learned judge, “you think that, if the owner himself had been on the spot, uninsured, he, in the exercise of a sound discretion, would have repaired the vessel, or that, if an agent of the underwriters had been there, he, exercising such discretion, would have repaired, then the master ought certainly to have done so. But if they would not have done so, then, I think, the captain was not compellable to repair, and the sale in such case will have taken place under a justifiable necessity.” (j) To the same effect, where the assured claimed to

(j) 4 C. & P. 284.

the United States, in the case of *New Eng. Ins. Co. v. Brig Sarah Ann*, 13 Peters, (S. C.) 387, where the court say; — “The true criterion for determining the occurrence of the master's authority to sell, is the inquiry, whether the owners or insurers, when they are not distant from the scene of stranding, can, by the earliest use of ordinary means to convey intelligence, be informed of the situation of the vessel, in time to direct the master, before she will probably be lost. If there is a probability of loss, and it is made more hazardous by every day's delay, the master may then act promptly, to save something for the benefit of all concerned, though but little may be saved. There is no way of doing so more effectually than by exposing the vessel to sale; by which the enterprise of such men is brought into competition as are accustomed to encounter such risks, and who know, from experience, how to estimate the probable profits and losses of such adventures.” A ship insured at Boston, in December, for one year, and owned partly in Boston, but chiefly in New Orleans, on her voyage from Boston to New Orleans, struck on a shoal on the coast of Florida, on the 18th of February following; but by the assistance of wreckers she was got off, and, according to a previous stipulation, insisted on by the wreckers, she proceeded to Key West, in order to have the salvage adjusted, either by arbitration, or by a judgment of a court of admiralty, the nearest court being three hundred miles distant. She arrived at Key West on the 23d of February. She did not leak, and she might have remained at Key West in safety, until notice of the disaster could have been sent to Boston. Notice was sent to the part owners at New Orleans, and one of them arrived at Key West on March 17th. A survey was then had, and the vessel was condemned as unworthy of being repaired, and on the 21st she was sold. The expense of repairing her at Key West would have exceeded fifty per cent. on her value, but at New Orleans or Boston, (to either of which ports she might have proceeded, and to the latter of which she did in fact proceed, after the sale, with the same master,) the expense would have been less than fifty per cent. It was held, that the sale was not necessary, and the underwriters were not affected by it. *Hall v. Franklin Ins. Co.* 9 Pick. 466. A vessel insured at Boston, while on a voyage to Mobile, struck on Carysford reef, and was injured to the amount of more than half her value, but she was got off, and arrived in safety at Mobile. While she was lying at a wharf in that port, a survey was held upon her, and the surveyors having recommended a sale, she was sold by the master, who was also a part owner and one of the insured, without consulting the insurers or the agent of the owners at Boston. It was held, that the master, as such, was not justified, under these circumstances, in selling the vessel. *Peirce v. Ocean Ins. Co.* 18 Pick. 83.

recover as for a total loss in respect of a submerged ship, which had been sold by himself as she lay, instead of being weighed up and repaired, Lord Tenterden, after telling the jury that the question was, whether "what had taken place was *equivalent to a total loss*," proceeded thus — "I think the circumstances in this case will have that effect, if, *at the time of the sale*, that measure, on the *sound exercise of the best judgment*, appeared most beneficial to all parties. It is not enough that the owner acted *honestly* in the sale, and intended to do for the best; the underwriters are not liable unless he formed a correct judgment, *that is, the best and soundest judgment that could be formed under the circumstances that then existed*. Nothing less than this, in my opinion, will make a total loss, while the ship continues in existence." (k) ¹

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And by Lord Tenterden in *Doyle v. Dallas*.

The same doctrine prevails in the United States, and has thus been expressed by Mr. J. Story: — "If the circumstances were such that an owner, of reasonable prudence and discretion, acting upon the pressure of the occasion, would have directed the sale, from a firm opinion that the vessel *could not be delivered from the peril at all, or not without the hazard of an expense utterly disproportionate to her real value*, then the sale by the master is justifiable." (l)

The same doctrine as expressed by Mr. J. Story.

The great difference between the doctrine in the two countries is this: that in America it is a technical total loss, whenever the cost of repairs exceeds *one half the repaired value*: ² here it is only so, when such cost exceeds *the full *repaired value*: bearing this distinction in mind, the rules in the United States, as to the constructive total loss of ship, apply equally here.

Difference between the doctrine of constructive total loss in the United States and in this country.

* 1088

In considering the decided cases, it will be found that in some, especially of the earlier decisions, the hopelessness of being able to extricate the ship from the peril at all, has been the main ground on which the courts seemed to have relied, as justifying the sale and making the loss constructively total: in others, and this applies generally to the later authorities,

The hopelessness of being able to extricate the ship at all is the main ground of decision in some of the cases; in others the hopelessness of doing so except at a cost greater than the repaired value.

(k) 1 Mood. & Rob. 54.

Sumner, 215, cited 2 Phillips on Ins. 317.

(l) Per Story, J. in *The Sarah Ann*, 2 *Aste*, 189 to 196, and notes.

¹ See ante, 189 to 196, and notes.

² Or, in some of the states, in case of a valued policy, one half the valuation in the policy. See post, 1111, and note.

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General doctrine of the right of the master to sell the ship, as stated by Parke, B., in *Hunter v. Parker*.

the principal test has been the cost of repairing the ship as compared with her estimated worth to her owner when repaired; in others, again, the two considerations have been blended together.

With regard to the general right to sell the ship, *as between the master and owner*, the doctrine that now prevails in English law has nowhere been stated with greater precision and accuracy, than by Mr. Baron Parke in the case of *Hunter v. Parker*, viz.: "That the master has, by virtue of his authority, not merely those powers which are necessary for the navigation of the ship, and the conduct of the adventure to a safe termination, but also a power, *when such termination becomes hopeless, and no prospect remains of bringing the vessel home*, to do the best for all concerned, and therefore to dispose of her for their benefit." (m)¹

This right only here considered so far as it is mixed up with the right to recover as for a total loss.

It will not, in this place, be necessary to enter into an examination of the authorities which have established this now undoubted principle of English law; nor, indeed, to consider the doctrine itself, except in so far as it is mixed up with the question of the right to recover for a total loss *as between the assured and the underwriters*,² of which, in many of the following cases, it is made the principal test.

Cases in which the right of the master to sell has been applied as a test of the right to recover as for a total loss.

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A ship stranded in the St. Lawrence was sold by the master with the advice of surveyors and the sanction of one of the part-owners,

Dismissing, therefore, from our consideration the earlier authorities, in which the doctrine of the right to sell in any case was regarded as doubtful, and passing at once to those *in which it was applied as a test of total loss, the following is one of the first, and among the most important, of the reported decisions: —

A timber-laden ship, bound from Quebec to London, encountered, soon after sailing, such furious gales, and was, in consequence, making water so rapidly that the master, as the only chance of saving the lives of the crew, was forced to run her ashore in the St. Lawrence, on the 21st November,

(m) 7 Mees. & Wels. 342; treating the cases of *Reid v. Darby*, 10 East, 143, as overruled to this extent by the subsequent cases of *Robertson v. Clarke*, 1 Bingh. 445. *Cambridge v. Anderton*, 2 B. & Cr. 591. 4 D. & Ryl. 203. *Somes v. Sugrue*, 4 C. & P. 174. &c.

¹ See Abbott, Shipp. (6th Am. ed.) 7 to 23, and in notes; 19, note, and cases cited; ante, 189 to 196, and notes; *Patapsco Ins. Co. v. Southgate*, 5 Peters, (S. C.) 604.

² See *The Schooner Tilton*, 5 Mason, 476.

1810: she took the ground outside a reef of rocks at the entrance, of Kamouraska bay, in the full tide-way of the river, so as to be exposed to the whole force of the drift ice, which was already beginning to float down in large masses. The master went up to Quebec and procured two surveys to be made, the result of which was that the surveyors advised him to sell her as soon as possible, being of opinion that, where she lay, she was in imminent danger of being carried away and destroyed by the ice: accordingly, under the direction of the agent for the owners at Quebec, who was also himself one of the part-owners, and who attended the sale, the master sold the ship as she lay, together with her rigging, stores, and cargo, for about 2060*l*. Contrary to all reasonable expectation, the ship survived the winter of 1810, and having in the course of the next spring, been got off by the purchaser at great expense, and floated up to Quebec, she was repaired there at a cost of about 550*l*.; and that same season performed a voyage to England, bringing over a full cargo and earning full freight. The plaintiff in the action, who had insured her freight and cargo, and had received information at one and the same time of the casualty and the sale, claimed a *total loss on the freight*, without having given any notice of abandonment.

The jury at the trial, found that the master had acted throughout the whole transaction fairly and *bonâ fide*, and that the sale was honestly, fairly and properly conducted, with a view to the benefit of all concerned.¹

On motion for a new trial, two questions were made before the Court of Common Pleas; 1. Whether, under the circumstances, the master had the right to sell the ship and cargo; *2. Whether there ought to have been an abandonment of the freight. The judgment of the court on the latter point has been considered elsewhere: as to the first point they held that the master was justified in selling, on the ground of urgent necessity, and, that being so, that the loss was total. (n) As to this point, Chief J. Dallas said, "Here it is said that the loss arose out of the act of the owner in selling, and that

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there being no reasonable probability of extricating her from the peril: held, by the Court of Common Pleas, a total loss on freight without abandonment, though the ship was afterwards got off by the purchaser, and brought home a cargo. *Idle v. Royal Exch. Ass. Comp.* 3 Moore, 115; 8 Taunt. 755.

Question for the court.

*1090

Ground of decision.

(*) *Idle v. Royal Exch. Ass.* 3 Moore, 115. 8 Taunt. 755.

¹ See *Gordon v. Mass. F. & M. Ins. Co.* 2 Pick. 240.

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The Court of King's Bench thought the necessity of the sale not to be inferred from the facts.

Ship sold by master abroad, because the estimated cost or repairs would have exceeded her repaired value: held a total loss of ship, though she was afterwards repaired by the purchaser, and made a voyage. *Robertson v. Carruthers*, 2 Stark. 571.

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The same circumstance held to make out an urgent necessity for the sale, and to constitute a total loss: the ship, in this case, was afterwards got off by the purchaser, but found irreparable and broken up. *Robertson v. Clarke*, 8 Moore, 622, 1 Bingh. 445.

the sale was not induced by any peril of the sea. But this distinction seems to me to be a fallacy: *the state of the ship, which led to the sale, was induced by the perils of the sea: she had incurred damage in the course of her voyage, which made it necessary to run her on shore, and she was stranded at the time; there was no reason for supposing she would have been got off the rocks, but, on the contrary, every probability of her going to destruction.* (o)

It certainly seems, that in this case, there existed such an urgent necessity as would now be held to justify a sale and constitute a constructive total loss: when, however, it came up on a special verdict before the court of King's Bench, that court expressed a clear opinion that the necessity of the sale could not be inferred from the facts stated, and as it was not specifically found, they awarded a *venire de novo* for the purpose of trying whether such necessity existed. (p) ¹

In the same year in which this case was decided, the following came before Lord Tenterden (then Chief J. Abbot) at Nisi Prius: a ship had been driven out to sea by a monsoon from Madras roads, and afterwards brought into Cuddalore, in so shattered a condition, that she could not proceed further without the most imminent risk of the lives of the crew, nor be repaired where she was except at a cost which it was estimated, on survey, would exceed the amount of the insurance: the captain, on this, sold her on account of *the underwriters: the ship having been repaired at Cuddalore in the course of two months, (it is not stated at what expense,) at the end of that time carried on a cargo to Calcutta. The assured on ship claimed a total loss, and a verdict was found for him for the full amount under the direction of Lord Tenterden. (q)

Five years later the following case came before the Court of Common Pleas while Lord Gifford presided there: a ship,

(o) 3 Moore, 151.

(p) 3 Brod. & Bingh. 151, note (a). The case, having been settled, never came on for trial a second time: whether the facts would not now be held to show a necessity for sale may be regarded as

doubtful. See the following cases, and that of *Hunter v. Parker*, 7 Mees. & Wels. 322.

(q) *Robertson v. Carruthers*, 2 Stark. 571. No notice of abandonment appears to have been given.

¹ See per Parker, Ch. J., in *Gordon v. Mass. F. & M. Ins. Co.* 2 Pick. 249, 265.

homeward bound from Mauritius to England, on making land at Algoa Bay, (Cape of Good Hope,) met with very bad weather, which increased to a gale, that continued incessantly till she arrived off Symond's Bay, on nearing which place the captain, by firing distress guns, got assistance from the inhabitants, who, with much difficulty, brought the ship into port. She was immediately surveyed; but the extent of her damage could not be ascertained, as she had a full cargo on board: she was, therefore, unloaded and surveyed a second time, when the surveyors, among whom was a Lloyd's agent, upon the captain's applying for advice, recommended she should be sold, *as the expense of repairing her would much exceed her original value.* The captain, acting on this advice, and *being ignorant of the insurance effected on her*, sold the ship and the damaged part of the cargo for 1100*l.* (the ship had been valued at 8000*l.* and the freight at 4000*l.* in the respective policies:) *no estimate of the expense of repairing was given in evidence*; but it appeared that the purchasers of the vessel, after a month had elapsed, succeeded in bringing her round to Table Bay, where she might have been fully repaired, *but, finding her so damaged as to make that course unadvisable, they had broken her up* instead of repairing: under these circumstances, the plaintiff, who had effected two policies on ship and freight, claimed a total loss; and the court held him entitled to recover on the former policy to the full amount, on the ground that an urgent necessity had been made out for the sale. (r)

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*Lord Gifford rested his judgment on the grounds that the sale was *bond fide*; that it was clearly for the benefit of all concerned, and that there was an urgent necessity for its being resorted to. (s)

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A ship, insured from the Cape of Good Hope to London, while taking in her cargo in Table Bay, was driven ashore by a tremendous storm, which left her high and dry on the strand, above the level of high-water mark, where she lay imbedded eight feet deep in sand, and very much strained and damaged. Surveys were made, and the result being, that in the opinion of experienced persons, the ship either

Ship driven ashore, so that, in the opinion of surveyors, she could not be got off *at all*, or only at a ruinous expense: held to be justifiably sold and totally lost, though she was

(r) Robertson v. Clarke, 1 Bingh. 445. on a separate ground: there was no notice of abandonment.
8 Moore, 622. On the freight policy a rule was granted to reduce the damages (s) See 1 Bingh. 450.

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afterwards got off, and, being repaired, made several voyages. *Mount v. Harrison*, 4 Bingh. 388; 1 M. & P. 14.

could not be got off at all, or if so, only at a ruinous expense, the captain sold her as she lay about ten days after the stranding: ¹ the purchaser, in about three months, after several unsuccessful attempts, succeeded in getting her off, and, having been repaired, (at what expense is not stated,) she afterwards made several voyages to England: Mr. J. Park thought the propriety of the sale in this case so clear, that he did not press it on the jury, and they without hesitation found for the plaintiff (who claimed a total loss on freight,) on the ground that the master was justified in selling. (t)

§ 397. The above cases sufficiently show, that, if there is either no reasonable chance of restoring the ship at all, or only at a cost exceeding her value when repaired, the master may sell, and the assured recover as for a total loss.

The sale of ship will not be justified, nor the loss constructively total, unless at the time of sale, that measure, in the prudent exercise of the best and soundest judgment that could then be formed, appeared most beneficial to all parties.

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The excess of the cost of repairs above the repaired value must be no mere measuring east.

It must, however, carefully be borne in mind, that the sale will not be justified, nor the loss constructively total, unless the facts are such at the time of the sale, as to make it clear beyond all reasonable doubt, either that the ship can never be extricated at all, or only at a cost greater than her repaired value: if this be not so, mere *bona fides* in the master or owner who sells will not justify the sale, nor bear out the assured in his claim for a total loss: ² the circumstances will not amount to a constructive total loss, unless, at the **time of the sale, that measure, in the prudent exercise of the best and soundest judgment that could then be formed, appeared most beneficial to all parties.*

Thus, with regard to the *estimated cost of repairs*, Chief J. Tindal told the jury in *Somes v. Sugrue*, "that it must not

(t) *Mount v. Harrison*, 4 Bingh. 388. 1 Moore & P. 14.

¹ A report of surveyors, that the ship is not worth repairing in consequence of the damage done her, is not conclusive as to the fact. *Gordon v. Mass. Fire and Marine Ins. Co.* 2 Pick. 249. But in this case, p. 264, Mr. Chief Justice Parker said; — "If they acted fairly, and the captain acted fairly, his acts in conformity with their opinion will be justified, unless it shall be made to appear by those who contest the loss, that the facts on which they founded their opinion were untrue, or the inferences they drew from those facts were incorrect. And the burden of proof should be upon those who would impeach these proceedings." See *Peirce v. Ocean Ins. Co.* 18 Pick. 83; *The Ship Fortitude*, 3 Sumner, 228.

² Unless the circumstances are such as to give a right of abandonment, the master cannot, by a sale of the ship, under the notion that the sale is necessary or expedient, give a right to the assured to abandon. *Orrok v. Commonwealth Ins. Co.* 21 Pick. 458.

be a *mere measuring cast*, not a matter of doubt and uncertainty whether the expense would or would not have exceeded the value, but it must be so preponderating an excess of expense, that no reasonable man could hesitate as to the propriety of selling under the circumstances instead of repairing." (u)

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So, again, with regard to the probability of *ever extricating the ship at all*, the sale will not be justified if the master has formed a hasty judgment, or resorted to that measure without having previously exhausted all the means in his power for the recovery of the ship: where, by means within his power, she can be so treated as to retain the character of a ship, he cannot, by selling her, even *bond fide*, convert the average into a total loss: *but the underwriters are entitled to have those means used on their account.*

Nor can the master resort to the sale without having first exhausted all the means in his power for the recovery of the ship.

The following cases illustrate these positions: —

The ship *Triton*, on the 11th October, 1828, having struck on an anchor in Buenos Ayres (inner) roads, filled rapidly, and the next morning sunk, so as to be completely under water at high tide, but only partly so at ebb: in the course of the same day, the captain (who was owner as well as master, and also plaintiff in the action) had the ship surveyed at low water by some ships' captains and a Lloyd's agent, who recommended she should be sold, as the expense of raising her *would probably be more than she was worth*, and the plaintiff accordingly next day sold her, for about 270*l.* Two days after this, the wind, which had been previously south-west, shifted to the north, — a circumstance, as is well known *to all sea-faring men in those parts, lowers the level of the water in Buenos Ayres roads (v); the purchaser, taking advantage of this, contrived to get the ship afloat, and afterwards repaired her at an expense of about 1300*l.*, so as to be fit for the Brazilian coasting trade, but not so as to have been fit for carrying on to England a cargo of hides which the plaintiff had contracted for at the time of the loss: the

Ship partially sunk and sold by owner, without making any exertion for her recovery, because the cost of weighing up and repairing her would probably exceed her repaired value: held not a justifiable sale, and consequently not a total loss. *Doyle v. Dallas*, 1 Mood. & Rob. 48.

* 1094

(u) 4 C. & P. 263. On the facts of *nan v. Meaburn*, 1 Bingh. 243. 8 Moore, 127. but the court granted a new trial, on the ground that the verdict was against the evidence. See also in illustration of the position in the text, *Morris v. Robinson*, 3 B. & Cr. 196. 5 Dowl. & Ry. 35. Can-

(v) The south-west wind, from its sweeping over the Pampas, is called the *Pampera*: there is an interesting account of its effect on the water level, in Robertson's *History of Dr. Francia*.

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Summing up of Lord Tenterden.

The impossibility of being able to raise the ship at all was decided on too soon.

The ship need not be so repaired as to be able to carry on her original cargo, but only so as to be able to keep the sea.

worth of the vessel before the accident was about 2500*l*. (at which sum she was also valued in the policy): what her value was after the repairs is not clearly stated.

On this state of facts, the plaintiff, who had effected a time policy on the ship, claimed to recover as for a total loss: his right to do so, Lord Tenterden told the jury, “depended on the question, whether, at the time of the sale, that measure, in the sound exercise of the best judgment, appeared most beneficial for all parties;” — “now the correctness of this judgment,” said his lordship, “will depend on two circumstances: 1. *The probability of being able to raise the vessel at all; and 2. The power of repairing her when so raised at a price rendering it worth while to do so.*”

“With respect to the first of these questions, the *sale certainly took place very soon*. There seems to have been a great change in the level of the water after it,—more, perhaps, than could have been anticipated at all, or, at all events, so soon. But it was known that the height of the water did vary greatly with the variation of the winds; *and I think that on the day of the survey, when it was determined to sell the vessel, it must have appeared uncertain whether she might or might not be raised.*”

With regard to the second point, his lordship, after stating generally the evidence as to the expense, adverted to the point made by the plaintiff’s counsel,—viz., that, after all these expenses, she was still unfit to sail to England with *a cargo of hides*, such as the plaintiff had contracted for: as to this, his lordship said, “I do not think that circumstance sufficient to justify the sale: *the underwriters do not undertake that the ship shall be able to carry this or that cargo. If the ship could have come to England in ballast (certainly with ANY cargo) so that on her arrival she would have been worth the money expended on her, I think she ought to have been repaired for the purpose. The loss of the voyage will not, in my opinion, make a constructive total loss of the ship.*” The jury, upon the whole facts, found a general verdict for the underwriters, which the court, on motion for a new trial, refused to disturb. (*w*)

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(*w*) Doyle v. Dallas, 1 Mood. & Rob. 48. In this case there was no effectual notice of abandonment.

The following case is to the same effect, or even stronger :

A ship, in the course of her voyage, was driven by a current upon the *Thistle Rock*, twenty-eight miles from *Gottenburgh*. The rock penetrated the bottom of the ship, and made very large holes, so that the crew were obliged to leave her, for the preservation of their lives. The captain consulted at *Gottenburgh* with several persons, amongst whom was a Lloyd's agent, who were all of opinion that the ship was a complete wreck, and that the best course was, for the captain to sell her as she lay. Accordingly, on the 4th October (six days after the casualty) she was sold for a small sum. Before the sale, however, the ship, on the 2nd October, had floated from the *Thistle Rock*, and got aground between two rocks on the island of *Torno*. From this situation the mate, with about twenty men, and an anchor and cable, had, on the day before the sale, tried to get her off for six hours, but without success. The purchaser of the ship got her off in five days, and in four more brought her to *Gottenburgh* for a small expense. He afterward completely repaired her for about 750*l.* : after the repair she was worth 1200*l.* Upon these facts being proved, Mr. J. Bayley told the jury, that "if the captain, by means within his reach, could have made a fair experiment to save the ship, with a fair hope of *restoring her to the character of a ship*, he was bound to have *employed those means on account of the underwriters, and could not, by selling, turn it into a total loss : " the jury found for the underwriters, and the court subsequently refused to set aside the verdict. (x)

The following case was decided on the same principle : a collier having come to Deal with a cargo of coals was, as is usual there, run upon the beach for the purpose of discharging her cargo (technically *beached*) : while there for that purpose the wind veered round, and, rough weather coming on, an attempt was made to haul off and float her : this failed, and the ship was drifted broadside on to the beach, and sustained so much damage that the master called a survey : the surveyors recommended a sale,¹ for the benefit of all parties, as

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If there is a fair chance, by any means within the master's reach, of so treating the ship as to restore her to the character of a sea going vessel, he cannot, by selling, make the loss total. *Gardner v. Salvador, 1 Mood. & Rob. 116.*

Summing up of Mr. J. Bayley.

* 1096

The jury must be satisfied not only that the owners, if uninsured, would have sold the ship, but also that they would have acted prudently in so doing. *Domett v. Young, 1 Carr. & Marsh. 465.*

(x) *Gardner v. Salvador, 1 Mood. & Rob. 116.* There was no notice of abandonment in this case.

¹ See *ante*, 1092, in note.

Cases of inavailability : where repair is impracticable, or would cost more than the repaired value, — right of master to sell.

there would be great expense, uncertainty, and risk in getting her off, and the probable cost of repairs might exceed her value : the master accordingly sold her as she lay for 185*l.* ; the purchaser got her off for about 50*l.*, and repaired her for 300*l.* more, after which she made several voyages : her worth when repaired is not stated : she was valued in the policy at 700*l.*

Upon these facts Mr. Baron Gurney told the jury, that, " they would have to consider whether the owners of the ship, as prudent men, exercising a sound judgment, would, if they were uninsured, have sold the vessel, or whether they would have employed persons to try to get her off, and, if successful, have repaired the vessel themselves, it being necessary for the plaintiffs, in order to recover as for a total loss, to satisfy the jury, *both that, if uninsured, they would have acted as they had done, and also that they had acted prudently in so doing.*" The jury found the loss not total. (y) ¹

The subsequent recovery and repair of the ship by the purchaser, even at a trifling cost, will not defeat the right of the assured to recover as for a total loss, where the facts were such as to justify the notice of abandonment, when given.

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§ 388. In most of these cases it will be observed, that the ship, after the sale and abandonment, was ultimately got off by the purchaser, and so restored by him as to be rendered navigable as a ship again : of course, if this were done with *comparatively little difficulty, and at a cost far less than her repaired value, it would be one amongst other circumstances to show the jury that the sale was not justified by necessity, and that the assured consequently could not recover as for a total loss : but, generally speaking, it may be laid down as the result of the cases, that the jury, in considering whether the sale was justified, must look mainly (if not exclusively) to the state of the circumstances *at the time of sale*. " The question is not, whether, *by possibility*, if a different conduct had been pursued by the master, the ship might not eventually have been saved, but whether, exercising the best discretion he could on the subject matter, he was not justified in selling, without entering into a nice and minute calculation." (z)

(y) *Domett v. Young*, 1 Carr. & Marsh. 465.

(s) *Per Abbott, C. J. in Robertson v. Carruthers*, 2 Stark. 572.

¹ See *ante*, 189, in note.

The same doctrine has been held in the United States, and is thus stated with admirable clearness by Mr. J. Story: "In the case of a sale of ship and cargo by the master, which can only be justified by urgent necessity, *if such necessity does apparently exist* AT THE TIME AND ON THE SPOT, I conceive that the master will be justified, although subsequent events may show that a different course might have been attended with success." (a) ¹

Cases of innavigability: where repair is impracticable, or would cost more than the repaired value, — right of master to sell.

It further appears from the authorities that, *as between the assured and the underwriter*, if the sale were otherwise justifiable, it makes no difference whether it were conducted by the master alone, where the assured has no agent, or by the master, with the sanction and attendance of one of the part-owners who is agent for the rest (b),² or even by the assured himself, who is both master and owner, and also plaintiff, in the action (c),³: "On the broad ground," says Chief J. Dallas, "of a power to act on a sudden emergency, to save as much *as* could be saved from impending ruin, whether it be the owner or captain, will make no difference, if the circumstances justified the selling, and the sale was honestly and fairly conducted." (d) ⁴

If the sale were otherwise justifiable, it makes no difference as to the right to recover for a total loss, whether it was by the master or owner, though plaintiff in the action.

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(a) Per Story, J. in *† The Ship Fortitude*, 3 Sumner, 228, cited 2 Phillips on Ins. 315. See also to the same effect the remarks of Ch. J. Kent in *† Fontaine v. Phoenix Ins. Comp.* 11 John. Rep. cited in 2 Phillips on Ins. 271. 311.

(b) As in *Idle v. Royal Exch. Ass. Comp.* 3 Moore, 115. 8 Taunt. 755.

(c) As in *Green v. Royal Exch. Ass. Comp.* 1 Marsh. Rep. 447. 6 Taunt. 68; and in *Doyle v. Dallas*, 1 Mood. & Rob. 48.

(d) Per Dallas, C. J. 3 Moore, 148.

¹ The fact that the vessel is got off, delivered of her peril, and repaired by the purchaser, after a sale, is certainly a strong circumstance against the necessity of the sale. But it is by no means decisive; for cases of this sort are not to be judged of by the event. A vessel may be apparently in a desperate situation, and yet, by some lucky accident, or unexpected concurrence of fortunate circumstances, she may be delivered from her peril. *The Brig Sarah Ann*, 2 Sumner, 215, 216; *Fontaine v. Phoenix Ins. Co.* 11 John. 295. See also *Hall v. Franklin Ins. Co.* 9 Pick. 466; *Peele v. Merchants Ins. Co.* 3 Mason, 27; *Wood v. Lincoln and Kennebec Ins. Co.* 6 Mass. 483.

² See *Hall v. Franklin Ins. Co.* 9 Pick. 466, cited *ante*, 1086, in note.

³ See *Peirce v. Ocean Ins. Co.* 18 Pick. 83, cited *ante*, 1086, in note.

⁴ Where, on a sale of the ship by the master, on account of damage, she is purchased by the master or by the owners, and repaired, the assured have not the right of abandonment. *Hall v. Franklin Ins. Co.* 9 Pick. 466; *Church v. Marine Ins. Co.* 1 Mason, 241. But see *Maryland & Phoenix Ins. Co. v. Bathurst*, 5 Gill & John. 159; *Woodward, J., in Robinson v. United Ins. Co.* 1 John. 611; *Kent, Ch. J., in Jumel v. Marine Ins. Co.* 7 John. 426; *Ogden v. Fire Ins. Co.* 10 John. 180.

Cases of innavigability: where repair would cost more than the repaired value, — cost of repairs how estimated.

Though no sale may have intervened, the assured may give notice of abandonment, and recover as for a total loss, wherever the estimated cost of repairs would have exceeded the repaired value.

Present rule of English law.

§ 389. In all the cases hitherto considered, a sale, whether by the master or by the owner, who is also plaintiff in the action, had, in fact, taken place before notice of abandonment, and claim to recover as for a total loss: it is, however, quite certain, that although no sale may have intervened, yet, if the state of the ship be such as would have justified a prudent owner, if uninsured, in the exercise of a sound discretion, to sell rather than to repair, from a reasonable certainty that the cost of repairs would exceed the repaired value, this is equally a constructive total loss, as though a sale had actually taken place (e), it being always remembered, that it is not the sale itself which gives the right to abandon, but the ship's being reduced to such a state, as to justify a sale.

The rule of law, in fact, is clearly settled, as stated by Chief J. Tindal in a recent case, "*that where the damage to the ship is so great from the perils insured against, as that the owner cannot put her in a state of repair necessary for pursuing the voyage insured, except at an expense greater than the value of the ship, he is not bound to incur that expense, but is at liberty to abandon, and treat the loss as a total loss.*" (f)

Questions as to the true construction of this rule

Several questions have arisen upon the true construction of this rule, which may, perhaps, be conveniently discussed under the three following heads: —

1. Of what nature are the repairs, the cost of which is to exceed the ship's value? 2. How is the cost of repair to be estimated? 3. What is that value of the ship with which such cost is to be compared for the purpose of ascertaining whether the loss is constructively total?

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First. Of what kind are the repairs alluded to in the rule? they need not be such as are requisite to enable the ship to carry on her cargo, but only to keep the sea for the voyage. *Reid v. Darby*, 10 East, 143.

**First*, then, as to the nature of the repairs alluded to in the rule: it is now clearly settled that these repairs are not to be such complete repairs as may be necessary to enable the ship to carry on the *same cargo*; but only such as are necessary to enable her to keep the sea, as a ship, again, in fact, to render her *navigable*, and capable of being carried on, either in ballast, or with any kind of cargo, to her port of original destination: thus, in the case of *Reid v. Darby*, where it appeared that the ship had been sold abroad, under a Vice-

(e) *Allen v. Sugrue*, 8 B. & Cr. 561. 3 (f) *Per Tindal, C. J.* in 6 M. & Gr. Mann. & Ryl. 9. *Young v. Turing*, 2 B. & Gr. 593.

Admiralty decree, upon a report of surveyors certifying that "the ship was totally unfit to proceed *with her cargo to her port of destination*;" and that the expense of such repairs as would enable her to do so would exceed her value when repaired, Lord Ellenborough said, in reference to this part of the case, "it is not found that the ship was *not navigable*, but only that she was not capable of being *navigated home with her then cargo*:" (g) the same circumstance, as we have already seen, has been held by Lord Tenterden not to justify the sale, on the ground that the underwriters indemnify only against the loss of the *ship*, not of the voyage, and the loss of the voyage, therefore, cannot make a constructive total loss of the *ship*. (h)

Cases of innavigability: where repair would cost more than the repaired value, — cost of repairs how estimated.

Doyle v. Dallas, 1 Mood. & Rob. 48.

So clearly is it established, indeed, in insurance law, that by the word "repairs" in the above rule is meant such repairs as are necessary to make the ship navigable for the voyage, that the Court of King's Bench refused to grant a new trial, on the ground that Lord Tenterden, in leaving a case of this kind to the jury, had not precisely expressed to them the necessary extent of the repairs: "a jury of London merchants," the court said, "must have understood them to be such repairs as would put the ship into condition for the voyage." (i)

Thompson v. Colvin, Ll. & Wels. 140.

Secondly, as to the mode of estimating the *cost of repairs*, *various questions have arisen both in this country and the United States. It may be taken as a settled rule in this country, that the cost of repairs is to be calculated with reference to all the circumstances attending the ship, at the place and time of the casualty; *i. e. the question is, what would it have cost to repair the ship where she lies*; ¹ and in

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Secondly. What is the mode of estimating the cost of repairs? It must be calculated, with reference to all the circumstances attending the ship at the time and place of the casualty.

(g) Reid v. Darby, 10 East, 143.

(i) Thompson v. Colvin, Ll. & Wels.

(h) Doyle v. Dallas, 1 Mood. & Rob. 48. 140.

¹ In Hall v. Franklin Ins. Co. 9 Pick. 466, it was decided that the expense of repairing the ship at the place where she is injured, is not the criterion for determining whether there is a constructive total loss, if there are no reasonable means of making the repairs at that place, and the ship can be safely navigated to a port where the repairs can be made at an expense of less than fifty per cent. on the value of the ship; but in such case it is the duty of the master to proceed to such port to make the repairs. Orrok v. Commonwealth Ins. Co. 21 Pick. 456, 466; American Ins. Co. v. Center, 4 Wendell, 45, 51; S. C. 7 Cowen, 564; ante, 1086, in note. See Patapsco Ins. Co. v. Southgate, 5 Peters, (S. C.) 604. So where, by making partial

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forming this estimate, all the then existing circumstances are to be taken into consideration: thus, where a ship was sold at a port where great difficulty existed in obtaining materials, and *at a season of the year peculiarly unfavorable for repairs*, Lord Tenterden told the jury to take both these circumstances into their estimation, in considering whether the probable cost of repairs was such as to justify the sale. (*j*)

So where a Dutch ship, stranded on the Goodwins, and brought into the port of London, would not sell *in England* for so much as it would cost to repair her here, owing to her being a foreign ship; nor *in Holland*, for so much as it would cost to repair her there, owing to a usage of trade in Holland, by which stranded ships would not be employed again by any of the Dutch trading companies; it was held by the jury, in comparing the cost of repairs with the ship's repaired value, were rightly directed to take all these facts into their consideration. (*k*)

Partial repairs at the place of the casualty may be added to subsequent complete repairs in estimating the cost.

If a ship be partially repaired at the place of the casualty, and afterwards arrive at her port of destination in a state of complete disability, so that the aggregate of the cost of the partial repair abroad, added to that of the repair necessary to make her a navigable ship again at home, would exceed the price for which she would sell at home after the repairs — this would seem to be a case of constructive total loss. (*l*)

So also the expenses of releasing the ship from the peril preparatory to repairing, must be added to the expense of the repairs in estimating the cost.

Whenever, in order to render the ship navigable, it would be necessary, not only to repair her, but also, as a preparatory step, to incur expense for the purpose of getting her off rocks, or weighing her up, it seems clear that the estimated expense of so doing ought to be added to the estimated cost

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(*j*) *Thompson v. Colvin*, L.L. & Wels. 140. See also *Read v. Bonham*, 3 Brod. & Bingh. 147. *Morris v. Robinson*, 3 B. & Cr. 196. 5 D. & Ryl. 35. *Cannan v. Meaburn*, 1 Bingh. 243. 8 Moore, 127. *Somes v. Sugrue*, 4 C. & P. 274.

(*k*) *Young v. Turing*, 2 M. & Gr. 593. 2 Scott's N. R. 752.

(*l*) So held in the United States, where

the aggregate cost of both repairs exceeds *half the value*. See cases cited, 2 Phillips on Ins. 282, 283. { *Center v. American Ins. Co.* 7 Cowen, 564. *American Ins. Co. v. Center*, 4 Wendell, 45. *Hall v. Franklin Ins. Co.* 9 Pick. 466. *Orrok v. Commonwealth Ins. Co.* 21 Pick. 456, 466. }

repairs, the vessel can be safely navigated to another port, where her repairs can be completed at such a sum that the whole expense will not exceed half the value of the vessel, the insured has no right to abandon. *Orrok v. Commonwealth Ins. Co.* 21 Pick. 456.

of the subsequent repairs, in order to ascertain whether the sale was a justifiable measure, and the loss constructively total. (m)

The whole estimated expense, in fact, of so treating the ship, as to make her fit to navigate the seas again, is that which a prudent owner, if uninsured, would take into his consideration in making up his mind whether to sell or repair; and must, therefore, be included in "the cost of repairs," as that phrase is employed in the rule now under discussion.

A question has been raised in the United States, whether, in estimating the probable cost of repairs, a deduction is to be made of one-third new for old: the better opinion there seems to be — an opinion advocated by the high authority of Mr. Justice Story (n), and adopted by the Supreme Court of the United States (o), that this deduction is not to be made in estimating the cost of repairs: ¹ Mr. Phillips, in-

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One third new for old is not to be deducted in estimating the cost of repairs.

(m) See the previous cases, especially *Mount v. Harrison*, 4 Bingh. 368. *Doyle v. Dallas*, 1 Mood. & Rob. 48. *Gardner v. Salvador*, *ibid.* 116. S. L. in the United States. See *† Bradl. v. Maryland Ins. Comp.* 12 Peters (S. C.) Rep. 400. *Se-wall v. United States Ins. Co.* 11 Pick. 90. } (n) In *† Peele v. Merchants' Ins. Comp.* 3 Mason, 27; and see 2 Phillips on Ins. 277. (o) In *† Bradlie v. Maryland Ins. Comp.* 12 Peters (S. C.) Rep. 399. See Phillips on Ins. *quâd suprad.*

¹ *Robinson v. Commonwealth Ins. Co.* 3 Sumner, 220, 225. In this case, Mr. Justice Story said; — "In calculating the half value, the rule laid down by the Supreme Court of the United States is, that the vessel, after she has been repaired, must be of double the value of the costs of the repairs, without any deduction of one third new for old; and that the deduction of one third new for old, is not to be made in cases of this nature, but is solely applicable to cases of a partial loss, where the owner has come again into possession of the vessel, and has received the benefit of the repairs. I am aware that a rule somewhat different has been laid down by the Supreme Court of Massachusetts. *Delbois v. Ocean Ins. Co.* 16 Pick. 303, 313, 314. On the present occasion, I feel myself bound to follow the doctrine of the Supreme Court of the United States, by whose judgment, indeed, I am bound; although, even as a new question, I have no hesitation to say, that I entirely concur in that judgment." See 3 Kent, (5th ed.) 330, 331; *Bradlie v. Maryland Ins. Co.* 12 Peters, 378; *Peele v. Merchants Ins. Co.* 3 Mason, 27. On the other hand, in *Delbois v. Ocean Ins. Co.* 16 Pick. 303, 313, 314, Mr. Justice Putnam, in giving the opinion of the Supreme Court of Massachusetts, said; — "In regard to the deduction of one third new for old, we think there is just as good a reason to apply the rule to the consideration, whether or not there was a technical total loss, as there is to apply it to a partial loss. In the latter case, it has been long settled, is uniformly applied, and generally works well. This point came directly under the consideration of the court of errors, in New York, in *Smith v. Bell*, 2 Caines Cas. 153, where a majority of the court of errors concurred with the opinion of Lansing C., that, to constitute a technical total loss of a ship by

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deed, seems opposed to the rule thus established (*p*): but, on principle, it appears correct, and, in fact, to follow as a consequence from the test of constructive total loss, as laid down in our own jurisprudence, viz. that the point to be considered is, whether a prudent owner, *if uninsured*, would sell rather than repair, from a calculation that the cost of repairs would exceed the repaired value: this clearly implies that all considerations as to the cost of repairs are to be disregarded, which have reference to the sum they would cost an owner, *if insured*.

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Is the expense of such repairs as the old and decayed state of the ship may have rendered necessary to be excluded in estimating the cost?

Another question has been raised, both in the United States, and recently in this country, viz. whether, in the case of an *old and decayed* ship, the jury, in estimating the probable cost of repairs, with a view to ascertain whether they would exceed the repaired value, are to be directed to exclude from their estimate the cost of all such repairs as the decayed state of the ship may have rendered necessary.

It is *not*, where the ship is shown or admitted to have been seaworthy when she sailed, and the necessity for repairs to have been caused by the perils insured against.

The better opinion in the United States, and the law as recently settled in this country would seem to be, that, if the necessity of the repairs may fairly be referred to the perils

(*p*) 2 Phillips on Ins. 278, 279.

the perils of the sea, she must be injured to the amount at least of half her value after deducting one third new for old. This is a practical rule, of the utility of which merchants and underwriters may, perhaps, be as competent to decide as judges are; and it may not be amiss to observe, that it has been introduced into some, if not all, of the Boston policies. Where a construction is to be made, in the absence of binding authority, we prefer that which restrains, rather than that which enlarges the right to make a technical total loss. We hope that in this state it will be considered as settled that a deduction of one third new for old is to be made in regard to technical total losses, as it is made in regard to partial losses." See also *Sewall v. U. S. Ins. Co.* 11 Pick. 90; *Winn v. Col. Ins. Co.* 12 Pick. 279; *Orrok v. Commonwealth Ins. Co.* 21 Pick. 456; *Hall v. Ocean Ins. Co.* 21 Pick. 472; *Reynolds v. Ocean Ins. Co.* 22 Pick. 191, 198. It should be observed, that in most of the Massachusetts cases above cited, there was a special clause in the policy, providing that the assured should not be entitled to abandon for the amount of damage merely, unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss, should exceed half the amount insured. But in *Deblois v. Ocean Ins. Co.* it does not appear that any such clause existed; and the reasoning and conclusions of the court were not based upon any thing peculiar in the facts before them. The rule, as stated in *Smith v. Bell*, above cited, appears to have been adhered to in *New York*. *Pezant v. Nat. Ins. Co.* 15 Wendell, 453. See *Amer. Ins. Co. v. Ogden*, 20 Wendell, 287, 297, 300; *Dickey v. N. York Ins. Co.* 4 Cowen, 222; *Center v. Amer. Ins. Co.* 4 Wend. 45. The adoption of the above rule in Massachusetts seems to have arisen from a desire to restrain abandonments under the American rule for technical total losses. *Deblois v. Ocean Ins. Co.* cited *ante*, 1067, in note.

insured against, and the ship is shown or admitted to have been seaworthy when she sailed, the jury need not to be told to exclude the expense of such repairs from their estimate, though, but for the casualty which caused the loss, the decayed parts of the ship might have been strong enough for the voyage.

Cases of innavigability: where repair would cost more than the repaired value, — cost of repairs how estimated.

The point in our jurisprudence seems to have been first raised, but not disposed of, in the case of *Thompson v. Colvin*.

In this case, an old ship (which was, however, *admitted to have been seaworthy when she sailed*) left Savannah on her voyage for Liverpool, but three days afterwards, owing partly to damage sustained in the Savannah river, and partly to heavy gales at sea, was found so leaky that she was obliged to put back to Savannah, and, on survey there, was declared unfit for service, and sold for the benefit of all concerned. The evidence as to her state when surveyed was contradictory; but, on the part of the defendants it was attempted to show that, although, owing to the generally decayed condition of the ship, to have thoroughly repaired her would have cost more than her value, yet the effect of the damage done to her by the perils of the seas might have been repaired, so as to have enabled her to complete her voyage, at a less cost. Lord Tenterden having told the jury, generally, that the loss was total if she could not have been repaired, so as to perform her voyage, for less than her worth when repaired, and the jury, on the evidence, having found for the plaintiff, a new trial was moved, on the ground that, *as the underwriters ought only to be liable for what were strictly the effects of the accident*, it ought to have been left distinctly to the jury to say, *whether the particular injuries arising from the perils insured against could not have been repaired, so as to make her seaworthy for the voyage, at a reasonable expense, although, from her general state of decay, it might not have been worth while to put her into complete repair*. The court, thinking the question as to the repairs had been properly left to the jury, and that they must have understood it fully, refused the rule. (q)

In such case it need not be left distinctly to the jury to say, whether the particular injuries arising from the perils insured against could not have been repaired for less than her repaired value. *Thompson v. Colvin, L. & Wels. 140.*

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It is remarked, in one of those notes which add so much value to all the reports of mercantile cases in which Mr.

Remarks on this case.

(q) *Thompson v. Colvin, L. & Wels. 140.*

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If an old and decayed ship is admitted to be seaworthy, the jury, in considering whether the cost of repairs would exceed her repaired value, need not be told to exclude from their estimate all such repairs as were made necessary by the old and decayed state of the ship.
 Phillips v. Nairne, 16 L. J. C. Pl. 194.

Lloyd was concerned, that it is of importance to make an express distinction between the *repairs necessary, in consequence of the general condition of the vessel*, and those which are required to *make good a damage covered by the policy*.

It is added, however, that, as in the particular case there was an admission of seaworthiness, the state of the ship at the time of survey must be taken to have been owing exclusively to the perils insured against. This last remark is corroborated by the following case: A ship, which was admitted to be seaworthy by a clause in the policy, in the course of her homeward voyage from China to London met with a violent hurricane, by which she received so much damage that she was obliged to put into the Mauritius; being there surveyed, it appeared that, from the damage caused by the storm, and the old and decayed state of the ship, she was not worth repairing: had it not been for the storm, however, the decayed state of the ship would not have prevented her from performing her voyage in safety: the assured, who had given due notice of abandonment, claimed to recover as for a total loss. Mr. J. Erle, before whom the cause was tried, left to the jury the question, "whether the cost of repairing the damage *arising from the perils insured against* would have been greater than the value of the ship when repaired?" directing them, if they thought so, to find for the plaintiff. The jury having found for the plaintiff as *for a total loss, a new trial was moved for, on the ground that they should have been told *that, in estimating the cost of repairs, they ought to exclude from their consideration all such repairs, as were made necessary by the decayed state of some parts of the ship*. The court, however, after argument, refused the rule, on the ground that the jury had been told to consider the *damage done by the perils insured against* as the matter on which their estimate should be founded: they added, moreover, that, on a careful examination of the evidence, they thought no repairs were included in the estimate, except such as were fairly referable to perils of the seas. (r)

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Doctrine in the United States as to this point.

The doctrine in the United States on this subject appears to agree with our own, and may be shortly stated to be that, if the ship be seaworthy for the voyage when she sailed, and

repairs have been rendered necessary, in the course of the voyage, by the perils insured against, the increased expense of making such repairs, arising from the old or decayed state of the ship, is not to be deducted in calculating whether the cost of repairing will exceed the ship's value when repaired (or, as the rule is in the United States, half the repaired value).

Cases of innavigability: where repair would cost more than the repaired value, — cost of repairs how estimated.

Thus, in one American case, Mr. J. Livingston remarked, "I adopt, as a general rule, that, if the old injuries (arising, in the particular case, from the ship's bottom being *worm-eaten* when she sailed) are not such as to make the ship innavigable (unseaworthy,) no deduction is to be made, on that account, from the cost of repair (s):" and in another case, the court said, that the objection could be made only in reference to the seaworthiness of the ship at the commencement of the voyage (t); in a third case, the rule is stated to be, "that, in case an injury is received by an old and decayed vessel which, independent of the accident, might have run some time; if the repairs cannot be put on her so that the unsound part can be used as formerly, without an expense equal to one half her value (in our law it would be exceeding her value when repaired,) or, in other words, where the *injury which the underwriters are obliged to make good is the cause of the decayed parts requiring repairs*, that then the assured may abandon: but if repairing the injury, which has arisen from one of the perils insured against, will replace her in the same situation she was in before, no matter how unsound all her other parts may be, then the insured shall not have this right, for all that they can ask is, that the ship may be placed *in statu quo*." (u)

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The rule, therefore, on the whole, appears to be this: if the ship was seaworthy when she sailed, the assured may abandon, and recover for a total loss wherever, by the perils insured against, the ship is so damaged that she cannot be rendered *navigable again*, except at a cost greater than her repaired value; and, in estimating such cost, no deduction is to be made for the increased expense of repairs, arising from

General result of the authorities as to this point.

(s) In *† Depeyster v. Col. Ins. Comp.* 2 Phillips on Ins. 280. (u) Per Porter, J. in *† Hyde v. Louisiana State Ins. Comp.* 1 Martin, N. S.
(t) *† Depeyster v. Ocean Ins. Comp.* 5 410. 2 Phillips on Ins. 281.
Cowen, 63. 2 Phillips on Ins. 280.

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The jury cannot, in estimating the cost of repairs, take into consideration sums due from the ship-owner as a contribution in general average.

her age or state of decay : if, however, she can be repaired, *so as to keep the sea*, at a less cost than her repaired value, the assured cannot elect to abandon merely because, owing to her decayed condition, the expenses of *complete repairs* would be greater than this.

In the United States it has been determined, that the assured on ship, in calculating whether she is worth repairing, is not entitled to take into consideration, in addition to the probable cost of repairs, sums due from him, as a contribution, in general average, to the owners of the cargo or freight in respect of previous jettisons (*v*) ;¹ and there seems little doubt that the point, if it should ever arise, would be decided the same way in this country.

Thirdly. What is the value of the ship with which the cost of repairs is to be compared ?

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§ 390. The *third* question relates to the "*value of the ship*," with which the cost of repairs is to be compared : in open policies it was never doubted that by these words were meant "the worth of the ship to the owner when repaired : " *it was, however, for some time a litigated question in English law, which has only recently been set at rest by the highest tribunal in this country, whether the standard of comparison was the same in valued policies : it is now conclusively decided that it is.¹

The first case in which the point was distinctly made, was *Allen v. Sugrue*, of which the facts were shortly these : — a

(v) † *Pezant v. National Ins. Comp.* 15 Wendell, 453. 2 Phillips on Ins. 284.

¹ Under the clause in the policy "that the assured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount, which the insurer would be liable to pay under an adjustment as of a partial loss, shall exceed half the amount insured," it has been held, that in order to authorize an abandonment for such cause, the particular average must amount to that proportion of the value of the ship independently of the general average charges. *Orrok v. Commonwealth Ins. Co.* 21 Pick. 456; *Hall v. Ocean Ins. Co.* 21 Pick. 472; *Reynolds v. Ocean Ins. Co.* 22 Pick. 191; *Sewall v. U. States Ins. Co.* 11 Pick. 90. See *Magrath v. Church*, 1 Caines, 215; *Potter v. Providence Washington Ins. Co.* 4 Mason, 298. So, expenses incurred, in order to ascertain the extent of the loss, are not to be included. *Hall v. Ocean Ins. Co.* 21 Pick. 472. So, the wages and provision of the officers and crew, while the ship is undergoing repairs, are not to be included in the estimates for ascertaining whether the cost of repairs will exceed the half value. But a reasonable allowance should be made for the custody of the vessel, if necessary, during such repairs, and for superintendence, which allowance should be charged to the account of labor. *Hall v. Ocean Ins. Co.* 21 Pick. 472.

² See *post*, 1111, in note.

ship, on returning from a Baltic voyage, stranded off the entrance to the old harbor of Hull (her home port,) and when brought into port was found to have been reduced by the stranding, and consequent damage, to such a state that, though her hull held together, yet she would require rather reconstruction, than repair to fit her for the sea again: she was valued in the policy at 2000*l.*: the estimated cost of repairing her was 1400*l.*; and when repaired she would not have been worth that sum. The court held that the assured, who had given notice of abandonment, and subsequently sold the ship, might recover the whole amount of the insurance. (*w*)

Cases of innavigability: where repair would cost more than the repaired value, — cost of repairs how estimated.

This value is not that fixed by the policy, but the repaired value.

Allen v. Sugrue, 8 B. & Cr. 561.

In answer to the objection that the assured would thus recover 2000*l.*, where the cost of repairs was only 1400*l.*, the court said that the question, *whether the loss is total or partial*, is precisely the same, whether the policy be valued or open; the only difference between them being, that in the one case the assured must prove the value of the thing insured, in the other he need not.

In the next case the facts were as follows: — a Dutch East Indiaman, two days after sailing from Rotterdam, on her outward voyage, was driven ashore on the Goodwin Sands in a gale, and deserted by the crew for the salvation of their lives; while she lay on the Goodwins she was plundered by wreckers of the greater part of her stores and rigging, and her masts were also cut away; but she still subsisted in specie as a ship: she was afterwards got off and carried into Ramsgate, and ultimately towed round to *London: her owners gave notice of abandonment, but did not sell, and the ship remained afloat in the Commercial Docks at the time of action brought. At the trial it appeared that the ship was valued in the policy at 8000*l.*, that her value as she lay on the Goodwins, if sold to be broken up, was 700*l.* and the salvage charges were 420*l.*: it also appeared that if she had been a British ship she might have been repaired in *England* for less than her value when repaired, but that, being a foreign ship, she could not have

A Dutch East Indiaman, after stranding on the Goodwin Sands, was so damaged that she could not be repaired in *England* for less than her repaired value *here*, nor in *Holland* for less than her repaired value *there*: Held a constructive total loss, though she might have been repaired in either country for less than her value in the policy.

Young v. Turing, 2 M. & Gr. 593; 2 Scott, N. R. 732.

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(*w*) Allen v. Sugrue, 8 B. & Cr. 561. 3 M. & Ryl. 9. S. C. at N. Pr. Dans. & L.

Cases of innavigability: where repair would cost more than the repaired value,—cost of repairs how estimated.

Direction of Ch. J. Tindal to the jury.

Judgment of the Court of Exchequer Chamber.

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sold there for so much as her repairs would have cost: that if repaired in *Holland*, however perfectly, she would not have fetched so much as the cost of her repairs, owing to a rule with the trading companies there, not to employ a ship that had been stranded as she had been. The effect, therefore, of the evidence was, that the ship, when repaired, would not have been worth the value of her repairs, either in England or in Holland, owing, in the one case, to the want of a British register, in the other, to the usage of trade in Holland.

Under these circumstances, Chief J. Tindal told the jury, 1. That, in considering whether this was a total or a partial loss, they ought not to take into account *the value in the policy*; 2. That, in considering the same question, they ought to look at *all the circumstances attending the ship* (i. e. that she was a Dutch ship, belonging to Dutch owners, and that the usage of trade in Holland was as proved,) and to judge whether, under all these circumstances, a prudent owner, if uninsured, would have declined to repair the ship; and, if so, they might find it a case of total loss: the jury having accordingly found a verdict for the full amount of the insurance, a bill of exceptions was tendered to the ruling of the Chief Justice, and the case carried up into the Court of Exchequer Chamber: that court held the direction of the Chief Justice right on both points: with regard to the first point, they said there was no case or principle in the law of insurance, which makes the estimated value in the policy, a circumstance on which the question of total or partial loss ought to turn, it being only intended to save the expense *and doubt, that may attend the investigation of value, as affecting the quantum of compensation: as to the second point, they said there was one plain way of considering the question. "If the underwriters had accepted the abandonment, would they have repaired the ship themselves, or would they not have taken into consideration that she was a *foreign* ship, and so could not obtain a *British* register? and that she was a *Dutch* ship, and therefore could not be advantageously sold in *Holland*, because, under the circumstances, the Dutch trading companies would not employ her? and if they necessarily must, and would, have considered all these things—

which would have led them to sell the ship for 700*l.* rather than repair her—the assured and the jury were equally entitled to take them into consideration.” (x)

Cases of innavigability: where repair would cost more than the repaired value,—cost of repairs how estimated.

The marketable value of the ship when repaired is the true test, and not the value in the policy.
Manning v. Irving,
1 Comm.
Bench, 168;
S. C. in Error,
2 id. 784; in
Dom. Proc.
July 26. 1847.

In the next and final case on the subject, the facts were these:—an East Indiaman, while lying in Madras roads, in the course of her voyage, was carried out to sea in ballast by a violent hurricane, and was necessarily brought into Calcutta, where, on survey, she was found so damaged that the cost of repairs would have been 10,500*l.*, and her marketable value, when repaired, would only have been 9000*l.*, either in England or at Calcutta: the latter sum was also her marketable value at the time of effecting the policy, and immediately before the casualty: she was, however, *valued in the policy* at 17,500*l.* The ship was neither repaired nor sold, but still lay at Calcutta *in statu quo* at the time of action brought. The owner, who immediately on hearing the result of the surveys, had given notice of abandonment, claimed to recover as for a total loss: and the jury found a verdict for the full amount of the insurance, subject to a special case, in which the question for the court was, whether, under the circumstances, the defendants were liable as for a total loss: in the course of arguing the special case, it was suggested by the counsel for the defendants, that though the *marketable value* of the ship, when repaired, was only, as stated, 9000*l.*, yet *her worth to her owners* was more, and, in fact, greater than *the estimated cost of the repairs; and that, therefore, the court could not infer that they, as prudent men, if uninsured, would not have repaired. In answer to this argument, Mr. J. Cresswell said, that the question was not whether *the plaintiffs*, if uninsured, would have repaired, but whether *a prudent owner* would have done so *abstractedly from any particular fancy*; and the court being of opinion that the facts clearly showed that a prudent owner, if uninsured, would in this case not have repaired, gave judgment for the plaintiffs. (y) The special case was then turned into a special verdict, with the additional finding, “that *a prudent owner, if uninsured, would not have repaired the vessel*;” and in this state it was taken into the Court of Exchequer Chamber,

Her worth to her particular owners has nothing to do with the question, which turns on her *fair marketable value*.

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Judgment of the Exchequer Chamber.

(x) Young v. Turing, 2 Man. & Gr. 393. 2 Scott, N. R. 732. (y) Manning v. Irving, 1 Comm. B. 168.

Cases of innavigability: where repair would cost more than the repaired value, — cost of repairs how estimated.

Case brought before the House of Lords.

who refused to disturb the authority of *Allen v. Sugrue* and *Young v. Turing* (z), and was finally carried before the House of Lords, and there argued by the counsel for the underwriters, mainly on the ground that, if the owners, under the circumstances, were allowed to recover under the policy the full amount of 17,500*l.*, the first principle of insurance law — that the policy is a contract of indemnity only — would be overturned. The opinion of the judges on the point, having been requested by their lordships, was delivered by Mr. J. Patteson; an opinion so replete with vigorous common sense and perspicuity, and throwing so clear a light on the whole doctrine, not only of constructive total loss, but also of valued policies, that no apology will be required for citing it somewhat at length: after stating, that had this been the case of an open policy, the assured would, under the circumstances, have been entitled to recover as for a total loss — the amount to be ascertained by evidence — his lordship proceeds as follows: —

Opinion of the judges delivered by Mr. J. Patteson.

“What difference, then, is there from the circumstance that the policy is a valued policy?

“By the terms of it, ‘the ship, &c., for as much as concerns the assured, by agreement between the assured and *assurers, are and shall be rated and valued at 17,500*l.*,’ and the question turns upon the meaning of these words.

“Do they, as contended for by the plaintiff in error (the underwriters,) amount to an agreement, that, for all purposes connected with the voyage, *at least for the purpose of ascertaining whether there is a total loss or not*, the ship should be taken to be of that value, so that when a question arises whether it would be worth while to repair, it must be assumed that the vessel would be worth that sum when repaired; or do they mean only that, *for the purpose of ascertaining the amount of compensation to be paid to the assured*, when the loss has happened, the value shall be taken to be the sum fixed, in order to prevent disputes as to the quantum of the assured’s interest. We are all of opinion that the latter is the true meaning; and this is consistent with the language of the policy, and with every case that has been decided upon valued

1110 *

policies." His lordship then, after taking a view of the cases cited in argument, especially *Allen v. Sugrue* and *Young v. Turing*, thus continued — "The principle laid down in these latter cases is this: that the question of loss, whether total or partial, is to be determined just as if there were no policy at all, and the established mode of putting the question, when there has been what is, perhaps improperly, called a constructive total loss of a ship, is to consider the policy as altogether out of the question, and to inquire what a prudent uninsured owner would have done in the state in which the vessel was placed by the perils insured against: if he would not have repaired the vessel, it is deemed to be lost.

Cases of innavigability: where repair would cost more than the repaired value, — cost of repairs how estimated.

In determining the question whether the loss be total or partial, the policy is considered as altogether out of the question.

"When this test has been applied, and the nature of the loss has been thus determined, the quantum of compensation is then to be fixed.

"In an open policy the amount of compensation must be then ascertained by evidence; in a valued one the agreed total value is conclusive: each party has conclusively admitted that this fixed sum shall be that which the assured is entitled to recover in case of a total loss."

"It is argued that this course of proceeding infringes on the generally received rule, that an insurance is a mere contract of indemnity, for that thus the assured may obtain more than a compensation for his loss; and it is so. A policy of insurance is not a perfect contract of indemnity: it must be taken with this qualification — that the parties may agree beforehand in estimating the value of the subject insured by way of liquidated damages, as, indeed, they may in other contracts to indemnify."

A policy of insurance is not a perfect contract of indemnity.

*1111

The House of Lords affirmed the judgment of the courts below, with costs. (a)

The principle thus fixed by the highest authority in this country had some time previously been established by the Supreme Court of the United States, the only difference being, that in America the loss is held constructively total when the cost of repairs exceeds half the repaired value: the rule is thus expressed by Mr. J. Story, in giving the judgment of the

Same doctrine in the United States.

(a) *Irving v. Manning*, in Dom. Proc. 26th July, 1847. I am indebted to the kindness of Mr. Clark for a copy of his MS. notes of the above case, and of the opinion of the judges: a report of the case will appear in the forthcoming number of Clark & Finelly's Reports.

Cases of innavigability: where repair would cost more than the repaired value,—cost of repairs how estimated.

Special clause in Boston policies.

Suggested similar clause for English policies.

1112 *

When, instead of being either sold or abandoned as irreparable, the ship is repaired by the master abroad on bottomry, and brought back to this country, charged with the amount of the bottomry bond; the assured, who has given notice of abandonment, cannot recover as for a total loss, because this amount exceeds the value of the ship, which is accordingly sold in order to satisfy it.
Benson v. Chapman, 6 M. & Gr. 792.

Supreme Court: "*that if, after the damage is or might be repaired, the ship is not or would not be worth, at the place of repairs, double the cost of repairs (with us it would be 'the cost of repairs,') it is to be treated as a technical total loss.*" (b)

In consequence of the establishment of this doctrine in the United States, it has become usual in the Boston policies to insert a special clause "that the assured should not have a right to abandon the vessel for the amount of damage merely, unless the amount, which the insurers would be liable to pay under an adjustment as of a partial loss, should exceed half the amount insured. (c) ¹

A similar clause, it should seem, might be inserted in our policies, to the effect "that, in case of damage to the ship, the underwriters should not be liable as for a total loss, unless *the estimated cost of the repairs should exceed the whole value in the policy."

§ 391. In all the cases hitherto considered, the ship has been either actually sold, or left unrepaired by her owners, at the time of action brought. A case lately came before the courts in which a question arose as to the constructive total loss of a ship, which, instead of being sold, or abandoned as irreparable, was repaired by the master on bottomry at the place of the disaster, and afterwards brought back to the country of the owners, and there sold to satisfy the bottomry bond: the facts of the case were shortly as follows:—a ship, bound from Pernambuco with goods on freight for Liverpool,

(b) † *Bradley v. Maryland Ins. Comp.* 12 Peters (S. C.) Rep. 398. † *Patapasco Ins. Comp. v. Southgate*, 5 Peters (S. C.) Rep. 604, cited 2 Phillips on Ins. 274. † *Peele v. Merchants' Ins. Co.* 3 Mason, 27. 3 Kent (5th ed.) 330. *Cohen v. Ins.*

Co. Dudley S. C. 147. } It is remarkable that no reference was made to these American authorities in the argument of *Irving v. Manning*.

(c) 2 Phillips, Ins. 275.

¹ In Massachusetts, where a vessel is insured under a valued policy, the valuation of the vessel in the policy is conclusive as to her value, in determining whether the expenses of repairing an injury sustained by her will exceed half of her value, and thus constitute a technical total loss. *Orrok v. Commonwealth Ins. Co.* 21 Pick. 456; *Deblois v. Ocean Ins. Co.* 16 Pick. 303; *Winn v. Col. Ins. Co.* 12 Pick. 279. The valuation is to be taken without any deduction of the premium. *Hall v. Ocean Ins. Co.* 21 Pick. 472, 482; *Orrok v. Commonwealth Ins. Co.* 21 Pick. 456, 467. The same rule is adopted in New York, 3 Kent, (5th ed.) 331, note (d); *Amer. Ins. Co. v. Ogden*, 20 Wendell, 287, 297, 300.

on sailing out of Pernambuco harbor, got aground, and was so much damaged as to be obliged to put back for repairs: the cargo having been taken out, and the ship surveyed, was, by the master's directions, repaired: the cost of such repairs as were necessary to make the ship navigable, and in a condition to proceed on her voyage, was 7132*l.* 2*s.* 6*d.*, to discharge which sum the master, after making every possible endeavor, found there was no other means than by giving a bottomry bond for the amount, on the security of ship, cargo, and freight, with marine interest at 20 per cent.: the assured, on first receiving intimation of the probable cost of repairs, gave notice of abandonment, at one and the same time, to the underwriters on the ship and freight: the ship, after being repaired, arrived in Liverpool, earning full freight, and, the assured declining to interfere, she was there sold for 1675*l.* in part satisfaction of the bottomry bond, and the freight earned, which was rather less than 2000*l.*, was also paid over to the obligees.

Cases of innavigability: where repair would cost more than the repaired value, — cost of repairs how estimated.

Under these circumstances the assured claimed a total loss on freight: and a verdict was found by consent for the whole sum, subject to a special case, in which the main question submitted to the court was, whether there was a total loss on the freight under the circumstances; the case, *as to this point* will be considered under the head of constructive total loss on freight: with regard *to the ship*, the Court of Common *Pleas assumed that it was a clear case of constructive total loss (*d*); but the Court of Exchequer Chamber, before whom the case was brought in the form of a special verdict, held that there was nothing in the facts, as above stated, to show that there had been a constructive total loss on ship: the special verdict, they remarked, found, indeed, that the cost of the necessary repairs would have exceeded the ship's value when repaired, together with the freight ultimately earned; but it did not find that a prudent owner, if uninsured and on the spot, would not have repaired, but abandoned the adventure: and even if it had, yet, as, in fact, the power of so abandoning the adventure was not exercised, as the vessel was, in fact, repaired by the master, the court could not infer that the master, in repairing, was not the agent of the owner; and, if so, the case stood as though the owner himself had re-

* 1113

Reversed in error.

Cases of innavigability: where repair would cost more than the repaired value,—cost of repairs how estimated.

Wilson v. Forster, 6 Taunt. 25.

Holdsworth v. Wise is distinguishable.

Doctrine as to this point in the United States.

1114*

In case of partial loss by innavigability, the underwriters have nothing to do with the bottomry bond.

paired the ship: in which case he clearly could not recover as for a total loss, merely because the amount of the bottomry bond exceeded the ship's value on arrival.(e) Upon the same principle, where a ship had been seized (under circumstances that did not cause a change of property,) and repurchased by the master, who afterwards repaired her on bottomry, and brought her home—Chief J. Gibbs held, that the owner could not, by refusing to pay the amount of the bottomry bond, entitle himself to recover as for a total loss on ship (f): where the repairs are done, not by the master as agent for the owners, *but by mere strangers, without his sanction or authority*, the case is different; and then, as we have seen, if the ship arrives charged with bottomry expenses, which exceed her marketable value, this is a constructive total loss.(g)

In the United States the law seems, on this point, to agree with the doctrine of the Court of Exchequer Chamber in *Benson v. Chapman*: the principle of decision being, that the assured, who claims to recover as for a total loss on ship by reason of innavigability, must abandon, for this cause, before making the repairs: he cannot proceed to repair, and then abandon after the repairs are made, at however great an expense.(h)

It is quite clear, and has been so decided in the United States, that, in case of a loss *less than total*, by reason of innavigability, if the master has bottomried the ship, in order to raise funds for repair, the underwriters have nothing whatever to do with the bottomry bond, but are simply bound to pay the partial loss, including their proportionate share of the extra expenses of obtaining the money in that mode, supposing no other way of raising it to have been practicable.(i)¹

(e) *Chapman v. Benson*, in error, from a MS. note of the judgment.

(f) *Wilson v. Forster*, 6 Taunt. 25. 3 C. 1 Marsh. Rep. 425.

(g) *Holdsworth v. Wise*, 7 B. & Cr. 794.

(h) The leading authority seems to be † *Humphrey v. Union Ins. Comp. 3 Mason*, 429, per Mr. J. Story, cited 2 Phillips on Ins. 272, 320. See also † De-

pau v. Ocean Ins. Comp. 5 Cowen, 63. 2 Phillips on Ins. 287: and † *Dickey v. New York Ins. Comp.* 4 Cowen, 222, 322. 3 Wendell, 658.

(i) Per Mr. J. Story, giving the judgment of the Supreme Court of the United States in † *Bradlie v. Maryland Ins. Comp.* 12 Peters S.C. Rep. 405, 406. See 2 Phillips on Ins. 294.

¹ Where a bottomry bond, executed at Hamburg, was given at a premium of twelve and a half per cent., and the bottomry holder agreed to give it up, if the sum advanced, and common interest were promptly paid, and the agent of the bottomry

If, indeed, the underwriters, in case of the apparent disability of the ship, have dissuaded the assured from persisting in his intention to abandon, and themselves ordered the repairs, they will be liable as for a total loss, if, on the ship's subsequent arrival in port, charged with a bottomry lien for the repairs, they refuse to discharge the bond, and allow her to be sold to satisfy the claim of the obligees (j): but it has been held by the highest authority in the United States, (against some previous decisions of the State courts,) that if a right to give notice of abandonment has once vested in the assured, owing to the ship being apparently irreparable, except at a cost exceeding *half* her repaired value, (or, as our law is, her *full* repaired value,) the underwriters cannot, by offering to take upon themselves the whole expense of the repairs, defeat the right of the assured to insist on his notice of abandonment, and recover as for a total loss. (k) ²

Cases of innavigability: where repair would cost more than the repaired value, — cost of repairs how estimated.

Unless they have dissuaded the shipowner from abandoning, and themselves undertaken the repairs.

An offer, however, by the underwriters, to take all the expense of repairs, cannot divest a once vested right of abandonment.

(j) *Da Costa v. Newenham*, 2 T. Rep. Judgment cited, 2 Phillips, 291, 292, and see the previous decisions, *Ibid.* 288–291.

(k) † *Peele v. Merchants' Ins. Comp.* 3 Kent (5th ed.) 327.
3 Mason, 27, per Mr. J. Story. See his

holder received a draft from the owners at Hamburg for the amount and common interest, and charged a commission for indorsing the draft, and the bond was thus taken up, the underwriters were held liable for the interest and commission, and bound to pay them as a part of the loss, since they thereby obtained the benefit of the surrender of the twelve and a half per cent. premium; and they were not entitled to the benefit without partaking of the burthen; but it was also held, that one of the owners, who transacted the business, and gave the draft, and took up the bottomry bond, as agent for all the owners, was not entitled to claim against the underwriters any commission on his disbursements, or for his services. *Peters v. Warren Ins. Co.* 1 Story, C. C. 464. As to this last point, respecting commissions, see *Brooks v. Oriental Ins. Co.* 7 Pick. 259; *Sage v. Middletown Ins. Co.* 1 Conn. 242.

¹ See *Hart v. Delaware Ins. Co.* 2 Wash. C. C. 346; *Ritchie v. U. States Ins. Co.* 5 Serg. & R. 501. The general right of the insurers to take measures for the better preservation of the property, and thus prevent the loss from becoming technically or absolutely total, without thereby binding themselves to the acceptance of an abandonment which they thus proved or rendered invalid, was upheld in *Wood v. Lincoln and Kennebec Ins. Co.* 6 Mass. 479; and it seemed to be the opinion of the court, in *Peele v. Suffolk Ins. Co.* 7 Pick. 254, that, where the assured, in a policy upon a ship which is stranded and greatly damaged, offers to abandon her to the insurer, and refuses to repair her, the insurer may himself take possession of her and repair her, and, if the repairs are made for less than half her value, he may restore her to the assured. See also *Griswold v. New York Ins. Co.* 1 John. 205. But unless the repairs are made within a reasonable time, the insurer forfeits his right to return her, and must be considered as having accepted the abandonment. *Peele v. Suffolk Ins. Co.* 7 Pick. 254. In *Reynolds v. Ocean Ins. Co.* 1 Metcalf, 180, it was decided that, if an underwriter, who has refused to accept an abandonment of a stranded vessel, takes possession of her for the purpose of removing, repairing, and restoring her

Cases of innavigability: where repairs would cost more than the repaired value, — cost of repairs how estimated.

1115 *

What kind of necessity will justify the master in resorting to a bottomry bond.

As to the kind of necessity that will justify the master in raising money for repairs on bottomry, it has been laid down *by Mr. Justice Story, in a most elaborate and learned judgment, that there must not only be a necessity for the repairs, but also a necessity of resorting to bottomry as the sole means of defraying them; and that it is only when this is the only, or the least disadvantageous, mode of borrowing, that the master is at liberty to avail himself of it, as a dernier resort. (l)

In short — as Chancellor Kent states the result of the case — good faith, and an apparent necessity under the exercise of the master's judgment, at the time, are sufficient to justify a bottomry bond. (m)

The doctrine of constructive total loss does not apply to contracts, or insurances, on bottomry.

§ 392. It should be added, that the doctrine of constructive total loss is not applicable to contracts of bottomry, nor to policies effected on bottomry loans. If the ship exist in

(l) Judgment of Mr. J. Story in the case of *The Ship Fortitude*, 3 Sumner's Rep. 228. (m) 3 Kent's Comm. (5th ed.) 163, note (b). < *Abbott Shipp*. (8th Amer. ed.) 156, 157, and cases cited in notes. >

to the owner, he is bound to use due diligence and despatch, as well in removing, as in repairing her; and want of such diligence and despatch in removing her, operates as a constructive acceptance of the abandonment, although the repairs are afterwards made with reasonable despatch. See also *Reynolds v. Ocean Ins. Co.* 22 Pick. 191. And the underwriter's duty and liability, in such case, are not varied by a clause in the policy of insurance, that "the acts of the assurer, in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered an acceptance of an abandonment;" such claim being inserted *diverso intuitu*. *Reynolds v. Ocean Ins. Co.* 1 Metcalf, 160. In a policy on a ship it was stipulated, that the underwriter should not be liable for a partial loss unless it should amount to fifty per cent., and that the assured should not abandon for damage merely, unless the amount, under an adjustment as of a partial loss, should exceed half of the amount insured. The ship was stranded, and the assured offered an abandonment, but the underwriter refused to accept it; and, against the will of the assured, the underwriter, within a reasonable time, got her off, and repaired her for less than half of the amount insured, and delivered her to the assured. It was held, that the interference of the underwriter, in saving and repairing the ship, was justifiable, and that inasmuch as he was not to be liable for a loss not exceeding half of the amount insured, he was entitled to recover of the assured the amount of the expenses of saving and repairing the ship. *Commonwealth Ins. Co. v. Chase*, 20 Pick. 142. The policy in this case provided "that the acts of the assured or insurers in recovering, saving and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of an abandonment." But it was held, that the legal construction would have been according to this express provision. The Court also expressed their approbation of the doctrine of *Wood v. Lincoln and Kennebec Ins. Co.* above cited, and the opinion there delivered by Chief Justice Parsons. See also *Dickey v. N. York Ins. Co.* 3 Wendell, 658.

specie, though in a state which would warrant an assured on ship to abandon, as where the cost of repairs would greatly exceed her value when repaired, the assured on bottomry cannot recover; for the ship must be absolutely and totally destroyed in order to discharge the borrower (*n*): *à fortiori*, capture, producing merely a temporary retardation of the voyage, and followed by restoration before action brought, will not discharge him. (*o*)

Cases of innavigability: where repair would cost more than the repaired value,—cost of repairs how estimated.

SECT. III. Cases of Constructive Total Loss on Goods.

ART. 1. Cases of Capture, Arrest, Seizure by Mutinous Crew, Desertion at Sea, &c.

§ 393. Capture, arrest, or embargo,¹ if likely to be of long continuance, barratrous seizure, or total desertion at sea by the crew; any forcible dispossession, in short, or effective privation of the control over his property, gives a *primâ facie* *right of abandonment to the assured on goods, just as in the case of the ship.

Constructive total loss on goods, in cases of capture, &c.

Capture, &c. is *primâ facie*, a constructive total loss on goods.

*1116

Capture, followed by confiscation, and unredeemed by any restoration of the goods or their proceeds before action brought, is, as we have already seen, a case of total loss on goods, without notice of abandonment. (*q*)

If, however, after capture, or even after capture and confiscation, the goods subsist in specie, and there is any chance of restitution, either of the goods themselves or their proceeds, by the issue of any pending negotiation, the assured cannot recover as for a total loss without notice of abandonment (*r*); *à fortiori*, he cannot do so where, before action brought, any part of the proceeds have been, in fact, restored to him by virtue of such negotiation. (*s*)

Where, after capture, goods are confiscated, subject to an appeal, notice of abandonment is requisite to make a total loss.

(*n*) *Thompson v. Royal Exch. Comp.* 1 M. & Sc. 30.

(*q*) *Mullett v. Shedden*, 13 East, 304. *Mellish v. Andrews*, 15 East, 13.

(*o*) *Joyce v. Williamson*, Marsh. on Ins. 700.

(*r*) *Tunno v. Edwards*, 12 East, 498.

(*s*) *Goldschmid v. Gillies*, 4 Taunt. 802.

¹ See as to embargo, *Lee v. Boardman*, 3 Mass. 245; *M'Bride v. Mar. Ins. Co.* 5 John. 399; *Odlin v. Ins. Co. of Pennsylv.* 2 Wash. C. C. 812; *Rhineland v. Ins. Co. of Pennsylv.* 4 Cranch, 48.

Constructive total loss on goods, in cases of capture, &c.

After final decree of restitution is given, the assured cannot abandon.

If, after capture and before notice of abandonment, a final decree of restitution has been made, it has been held in the United States, and no doubt would be so in this country (*t*), that the assured on goods cannot, on hearing at one and the same time of the capture and the decree of restitution, give notice of abandonment, although the goods may not, in fact, have been at that time actually restored to him, for there is then no such prospect that the loss, as to him, will be eventually total, as to justify a notice of abandonment (*u*); and the case is the same where notice of abandonment has been given after the final decree of restitution was, in fact, made, but before the assured had heard of it. (*v*)¹

If, however, after notice and before action brought, captured goods are restored, the right to recover as for a total loss is devested.

1117 *

But, although a *prima facie* right of abandonment may have been duly exercised by giving notice of abandonment when the circumstances justified it, still the right of the assured to recover as for a total loss depends, in this country, as in the case of the ship, upon the ultimate state of the property before *action brought;² if before that time, the goods, after capture and recapture, have been restored to the assured, or brought into this country under such circumstances, that he may, if he pleases, take possession of them, and may reasonably be expected to do so, his right to recover as for a total loss will be thereby devested.

Naylor v. Taylor, 9 B. & Cr. 718.

Thus, where, after seizure of the ship for breach of blockade, and subsequent rescue by the master and crew, the goods were brought back *to their home port of loading in this country*, and there warehoused, so that the assured might have had possession of them on paying the salvage expenses, but, instead of doing so, he let them remain where they were,

(*t*) See acc. *Barker v. Blakes*, 9 East, 283.

(*v*) † *Marshall v. Delaware Ins. Comp.* 4 Cranch, 202, cited 2 Phillips, 340.

(*u*) † *Adams v. Delaware Ins. Comp.* 3 Binn. 287, cited 2 Phillips, 340.

¹ But see *Dorr v. N. Eng. M. Ins. Co.* 4 Mass. 221. A capture gives the right of abandoning immediately; and this right continues so long as the property remains in the hands of the captors, whether in port or at sea. The right of abandonment, as for a total loss, continues after condemnation and appeal by the assured to a superior court. *Dorr v. Un. Ins. Co.* 8 Mass. 494; *Rhineland v. Ins. Co. of Pennsylv.* 4 Cranch, 29. So after an acquittal and an appeal by the captors, which prevents the decree of restitution from being executed. *Bordes v. Hallett*, 1 Caines, 444.

² Before *abandonment*, in the United States, *ante*, 993, 994, 1037, in notes.

and, relying on a previous notice of abandonment, brought his action for a total loss — Lord Tenterden and the Court of King's Bench held that he could not recover what he claimed, as the loss had, in fact, ceased to be total, by this restoration of the goods, before action brought. (w)

Constructive total loss on goods, in cases of capture, &c.

As, however, in the case of the ship, the mere fact that the goods are restored, or subsist in specie, before action brought, is not of itself sufficient, irrespective of all considerations as to the circumstances under which the restoration takes place, to deprive the assured, who has once justifiably given notice of abandonment, of his right to insist on such notice and recover as for a total loss.

The mere fact, however, of restoration, or subsistence of the goods in specie before action brought, will not *per se* devert the right to recover as for a total loss.

A ship, after sailing from the African coast with a cargo of timber on board, insured from Sierra Leone to this country, was barratrously seized by her crew and carried off to Barbadoes, where the ship and part of the cargo were sold (*but not for or on account of the assured*) to defray the expenses incurred there; the remainder of the timber (186 logs out of 233) was afterwards forwarded to this country by another ship, but not by the directions of the assured or any person authorized by him: on its arrival he at first seemed disposed, but ultimately refused, to take to it, and it was sold in this *country, but not by him or his orders: after this, having given due notice of abandonment on first hearing of the casualty, he brought his action for a total loss: the court held this to be a clear case of constructive total loss. "Here," said Lord Tenterden, "by the fraud and barratry of the master and mariners, the cargo was taken out of the possession of the assured. *From that time* it became to him a total loss. The payment of the wages at Barbadoes, and the sending home the 186 logs, were not acts of the assured or of any person authorized by him." (x)

As where goods mutiniously seized by the crew are afterwards brought, sent back to this country by mere strangers, without the direction of the assured. *Dixon v. Reid*, 5 B. & Ald. 595.

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So, where, after desertion of the ship by the crew, and notice of abandonment duly given, the goods were, many months after the loss, *delivered to the agents of the assured abroad*, before action brought, but in such a state of damage,

Delivery of the goods to the agents of the assured abroad, in such a state of damage that they would be

(w) *Naylor v. Taylor*, 9 B. & Cr. 718. 4 M. & Ry. 326. S. C. at N. Pr. Dana. & Ll. 240. It did not appear distinctly why the plaintiff had not taken to his goods again: probably it was because, having been calculated for a *South American* market, they would find no sale in Liverpool.

(x) *Dixon v. Reid*, 5 B. & Ald. 597. 1 Dowl. & Ry. 207.

Constructive total loss on goods, in cases of capture, &c.

worthless if sent on, is not such a restoration of them as to defeat a right of abandonment once vested on the total desertion of the ship at sea.

Parry v. Aberdeen, 9 B. & Cr. 411.

Where the goods have never been effectively restored to the possession or means of possession of the assured after capture, &c. the right to recover for a total loss is not devested.

1119*

Goods after capture and recapture are prevented by an embargo from being sent on to their port of destination, but are ultimately taken elsewhere, so that they never come into their owners' hands: held a constructive total loss on goods. Cologan v. London Ass. Company, 5 M. & Sel. 447.

that they would have been worthless if sent on to their port of destination, even had there been a ship to take them on, which there was *not*; and they were, consequently, sold at the foreign port for less than the expenses of salvage — this was held not to be such a restoration of the goods as to prevent the assured from insisting on his abandonment, and recovering as for a total loss. (y)

The ground of decision in this case was, that the total loss, occasioned by the desertion of the ship by the crew, *had never ceased to be a total loss as to the goods*. "Can any person say," asks Lord Tenterden, "that the goods, although remaining in specie, were not as effectually lost to the assured, when the ship was deserted, as if they had then gone to the bottom of the sea, or that the subsequent events produced a restoration of them to her owners?" (z)

If capture, seizure, arrest, or other cause which, *prima facie*, gives the right of abandonment, be followed, after notice of abandonment, by re-capture, decree of restoration, &c., this will not prevent the assured from recovering as for a total loss, in cases where the goods have never been effectively *restored into the possession, or means of possession, of the assured before action brought: ¹ in such case the loss once total, by the capture, &c. continues total as to the assured, by the privation of all control over, or possession of, his property, down to the time of action brought.

A ship, with a cargo of wheat, insured, "free of average," from Quebec to *Teneriffe*, was captured in the course of her voyage, but afterwards re-captured and taken into Bermuda; there part of the wheat was thrown into the sea as putrid; and as to the rest, in consequence of an embargo then laid on all provisions in Bermuda, (owing to a scarcity of food there,) the captain was refused permission to forward it to *Teneriffe*, and, consequently, offered it for sale at Bermuda: owing to the low price bid, he bought it in for his owners, and wrote to England to inform them of what had past; on

(y) Parry v. Aberdeen, 9 B. & Cr. 411.

(z) Parry v. Aberdeen, 9 B. & Cr. 16.

4 M. & Ry. 343.

¹ Before abandonment, in the United States. Dorr v. N. Eng. M. Ins. Co. 4 Mass. 221; ante, 993, 994, in notes, 1097.

receipt of this letter the assured gave immediate notice of abandonment. Subsequently, the captain, having got leave to carry his wheat (together with other goods) to *Madeira*, for the benefit of the English garrison there, sailed to that island, sold his wheat, and took in a cargo of wine, with which he arrived in England, before action brought: the assured, relying on their previous notice of abandonment, brought their action for a total loss, and the court held, under the circumstances, that they had a right to recover the whole amount they claimed. (a)

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Mr. J. Bayley puts the case in a very clear light: "The destination is to *Teneriffe*; the ship, with the cargo, in her course thither, is captured; re-capture follows, but not so as to enable the ship to proceed to *Teneriffe*, for she is sent to Bermuda, where she is placed under an embargo, from which she is never released, except upon condition of altering her destination to *Madeira*. Therefore there has been no restitution of any part of the cargo, as it regards the risk insured to *Teneriffe*." (b)¹

Remarks on this case.

An insurance on goods is a contract to indemnify the assured for any loss he may sustain by his goods being prevented, by the perils of the seas, from arriving in safety at their port of destination (d):² if, therefore, the assured has given notice of abandonment, at a time when the loss was total by the forcible dispossession of all control over his goods, he will not be precluded from afterwards recovering as for a total loss, by their being restored to him, before action brought, under circumstances which make it utterly hopeless for him ever, or within any assignable period, to procure their arrival at their destined port. *Loss of the voyage*, in this sense,

Where goods, by the perils insured against are wholly prevented, owing to a cause continuing down to time of action brought, from arriving at their port of destination, this is a case of constructive total loss.

* 1120

(a) *Cologan v. London Ass. Comp.* 5 (d) Per Bayley, J. 5 Maule & Sel. 455. Maule & Sel. 447. Per Lord Abinger in 3 Bingh. N. C. 278. (b) *Ibid.* 456.

¹ Goods being insured from New York to Amsterdam, with liberty, in case of being turned off on account of blockade, "to proceed to a neighboring port;" the master learning that Amsterdam was blockaded, put into the port of London. This the court held to be a *neighboring port*, and allowing that the blockade would have broken up a voyage to Amsterdam only, they held that it did not break up the voyage described in the policy, so as to give a right to abandon the goods. *Ferguson v. Phoenix Ins. Co.* 5 Binn. 544.

² See *Dorr v. N. Eng. M. Ins. Co.* 4 Mass. 221.

Constructive
total loss on
goods, in cases
of capture, &c.

i. e. a practical and effective impossibility of ever sending the goods on to their port of destination, is, if caused by the perils insured against, a constructive total loss on *goods*, though, as we have already seen, it would not be so on *the ship*: this complete hopelessness of ever bringing the adventure on the goods to a successful termination — this forced termination of the risk by the perils insured against — is carefully to be distinguished from that mere temporary retardation of the voyage for the season, which, as we shall see hereafter, gives in itself no right of abandonment of goods, except where, being perishable and sea-damaged, it is impossible to send them on in the same, or any other, ship, and, therefore, necessary to sell them at the port of casualty.

The following case is an illustration of the above principles: —

A neutral ship is detained in a British port for search, until her port of destination is declared blockaded by the British government, whereupon the goods, after decree of restoration, are sold, because, owing to the blockade they cannot be forwarded; this is a case of constructive total loss on goods. *Barker v. Blakes, 9 East, 283.*

1121 *

An American (neutral) ship, having on board a cargo of oil, insured from New York to *Havre*, was seized on her voyage by a British cruiser, and carried into Bristol on suspicion of having enemy's goods on board: while she was there detained, the British government declared the port of *Havre* to be in a state of blockade, *and it so continued from that time until the commencement of the action*: some time after this, a decree having been made for the restoration of the oil to the assured, it was given up to their agents in this country, who applied to the captain of the ship to reload and *carry it on to *Havre*, which, however, he absolutely refused to do, and sailed away to New York, leaving the oil behind him in Bristol, where it was sold, without prejudice to the rights of the parties: after this, the assured brought his action for a total loss. He failed in the action, because his agents had not given notice of abandonment till too late: but had the notice been duly given, Lord Ellenborough intimated that he might have recovered what he claimed, on the ground that, "although the goods themselves had been ordered to be restored, and were capable of being so, yet the *impossibility of prosecuting the voyage to the place of destination*, which arose during, and in consequence of, the prolonged detention of the ship, might properly be considered as a loss of the voyage; and such loss of the voyage, on received principles of insurance law, was to be regarded as a total loss of the

goods which were to have been transported in the course of such voyage." (e)

Constructive total loss on goods in cases of capture, &c.

This case, in fact, shows, what Lord Ellenborough stated to be the true doctrine on another occasion, "that a total loss of the cargo may be effected by a total and permanent incapacity in the ship to perform the voyage, for that is a destruction of the contemplated adventure." (f)¹

ART. 2. Cases where the Goods cannot be transhipped, or are reduced to such a state as not to be worth forwarding — Right of Master to sell the Cargo.

§ 394. Where the original ship is disabled in the course of the voyage, and no other can be procured at the port of the casualty, or any neighboring port,² the master has a right, where the cargo is of a perishable nature and sea-damaged, to sell it at such port, for the benefit of all concerned; and the assured on goods, in like case, may abandon, and recover as for a total loss.³ Where, however, the original ship can

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* 1122

General principles as to constructive total loss on goods by reason of sea-damage, where the original ship is disabled, and they cannot be transhipped, or are not worth the expense of transhipment.

(e) *Barker v. Blakes*, 9 East, 283.

(f) In *Anderson v. Wallis*, 2 Maule & Sel. 240.

¹ See *Robinson v. Commonwealth Ins. Co.* 3 Sumner, 224; *Moses v. Col. Ins. Co.* 6 John. 219.

² The burthen is on the assured to show this. Per Kent, Ch. J. in *Schieffelin v. N. York Ins. Co.* 9 John. 21, 23.

³ In *Robinson v. Commonwealth Ins. Co.* 3 Sumner, 224, Mr. Justice Story said, — "The underwriters undertake, that the cargo shall be capable of arriving at the port of destination, notwithstanding any of the perils insured against. It is, therefore, an insurance on the cargo for the voyage; and if, by reason of the perils insured against, the cargo is permanently prevented from arriving at the port of destination, that constitutes a total loss, for which the insured is entitled to recover, upon a policy like the present. If the vessel during the voyage, is injured by the perils of the seas to the extent of half her value, and no other vessel can be procured to carry on the cargo to the port of destination; or, if the vessel, though repairable, cannot be repaired within a reasonable time, and before the cargo, being of a perishable nature, will be irretrievably destroyed by the delay to repair, in such case, the insured is entitled to abandon, and recover for a total loss." See *Patapasco Ins. Co. v. Southgate*, 5 Peters, 604; *Whitney v. New York Fireman's Ins. Co.* 18 John. 208; *Gilbert v. Hallett*, 2 John. Cas. 226; *Schieffelin v. New York Ins. Co.* 9 John. 21. Where the loss, as being partial or total, depends on the amount of damage merely, the rule is the same in respect to the cargo, as in a policy on the ship; if the loss exceed half the value, the assured may abandon. *Gardner v. Smith*, 1 John. Cas. 141; *Judah v. Randall*, 2 Oakes, Cas. 324; *Ludlow v. Col. Ins. Co.* 1 John. 335; *Moses v. Col. Ins. Co.* 6 John. 219; *Marquardier v. Chesapeake Ins. Co.* 8 Cranch, 39; 3 Kent, (5th ed.) 289; *ante*, 1652 is note; *Budd v. Union Ins. Co.* 4 McCord, 1. A loss of more than fifty per cent. upon goods, by compromise with captors, has been held to be a total

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be repaired, with any prospect of sending on the cargo, or what remains of it, in a marketable state to its port of destination, or where another ship can be procured, either at the same or a contiguous port, without any very extraordinary delay or sacrifice, the master is, at all events, empowered, if not bound, to send it on; and he certainly has no right, in such case, to sell; nor can the assured on goods abandon and recover as for a total loss.¹

If the cargo be imperishable, or, though perishable, not so sea-damaged as to be in danger of being spoiled or destroyed by the delay, the mere impossibility of repairing the original ship, or procuring another, in time to send on the cargo, *so as to save the season*, will not entitle the master to sell, nor the assured, on abandonment, to recover as for a total loss:² mere loss of the voyage for the season is never a constructive total loss on *imperishable* goods, and can only become so in the case of *perishable* goods, when they are so sea-damaged

loss, the same as sea-damage in that proportion. *Clarkson v. Phoenix Ins. Co.* 9 John. 1; *Waddell v. Col. Ins. Co.* 10 John. 61; *Vandenheuevel v. United Ins. Co.* 1 John. 406. Where there was an insurance on certain articles enumerated in the policy, and a moiety of them were lost, the assured was held entitled to abandon as for a total loss, though the loss was not equal to a moiety of the whole cargo. *Vandenheuevel v. United Ins. Co.* 1 John. 406. Where a technical total loss is sought to be maintained, upon the mere ground of the deterioration of the cargo, at an intermediate port, all deterioration of memorandum articles must be excluded from the computation, where there are both memorandum and non-memorandum articles on board. In such a case, no abandonment for mere deterioration in value, could be valid, unless the damage on the non-memorandum articles exceeded a moiety of the whole of the goods insured, including the memorandum articles. The case was considered, as to the underwriters, the same as though the memorandum articles should exist in a sound state. *Marcardier v. Chesapeake Ins. Co.* 8 Cranch, 39, 48. There can be no technical total loss by damage to goods insured "free from average." *Aranzamendi v. Louis. Ins. Co.* 2 Louis. Rep. 432; *Moreau v. U. S. Ins. Co.* 1 Wheaton, 219; *Nelson v. Col. Ins. Co.* 3 Caines, 108, 110; *Buchanan v. Ocean Ins. Co.* 6 Cowen, 318, 331.

¹ *Ante*, 187, 188, and note; *Saltus v. Ocean Ins. Co.* 12 John. 107; *Treadwell v. Union Ins. Co.* 6 Cowen, 276; 3 Kent, (5th ed.) 212, 213; *Abbott, Shipp.* (6th Am. ed.) 365, 366, in notes. In *Bryant v. Commonwealth Ins. Co.* 13 Pick. 542, a cargo was insured from Havana to Castine, in Maine, and was wrecked on the coast of Virginia, about forty miles from Norfolk, but was taken from the vessel without being damaged, and might have been sent by land to Norfolk, and thence by water to Castine, for less than fifty per cent. of its value; but the master, instead of sending it to its place of destination, sold it on the beach; it was held, that the insurers were not liable for a total loss. It seems that during such transportation by land, the cargo would be at the risk of the underwriters. *Id.* See S. C. 6 Pick. 131, 143, cited *ante*, 188, in note. But see *Saltus v. Ocean Ins. Co.* 12 John. 107; *ante*, 188, and note.

² See *ante*, 185 to 188, and notes, 196, and in note, and *Bryant v. Commonwealth Ins. Co.* 13 Pick. 542, there cited; *Saltus v. Ocean Ins. Co.* 12 John. 107.

that to keep them till they can be sent on would involve their being destroyed, or rendered worthless for all merchantable purposes. If, indeed, a perishable cargo is reduced by sea-damage to such a state, at the intermediate port, that, if sent on to its port of destination, it would perish before arriving there, from the progress of rapid putrefaction, the master is justified in selling, and the assured may recover a total loss, even without notice of abandonment, *although the original ship may not be disabled, but capable of being repaired so as to take on the cargo.*¹

Constructive total loss on goods: where they are sea-damaged, and cannot be forwarded — right of master to sell the cargo.

All the circumstances, in fact, are to be considered; and the true doctrine appears to be, that the master cannot sell, nor the assured recover, as for a constructive total loss, if, upon the whole, it is reasonable, taking into view the nature and actual state of the cargo, together with the time, expense, and risk of procuring the means of sending it on, that the master should hire another vessel for that purpose, or keep it till the original ship can be repaired: if it is not reasonable that he should do this — if, that is, a prudent owner being on the spot, and uninsured, would, in the exercise of the best and soundest judgment that could be formed under the circumstances, rather sell the cargo at the place of the casualty than attempt to forward it, the sale by the master will be justifiable, and the assured on giving timely notice of abandonment, may recover as for a total loss.²

Doctrine of constructive total loss, and right of sale on sea-damaged goods, as derivable from the cases.

* 1123

¹ *Jordan v. Warren Ins. Co.* 1 Story, C. C. 342; *McGaw v. Ocean Ins. Co.* 23 Pick. 405; *ante*, 186, 187, and cases in note, 195, 196, and cases in note; *Whitney v. N. York Firem. Ins. Co.* 18 John. 208. Where a cargo is so much injured that it will endanger the safety of the ship and cargo, or it will become utterly worthless, it is the duty of the master to land and sell it, at the place where the necessity arises, even although it might have been carried to the port of destination, and there landed. *Jordan v. Warren Ins. Co.* 1 Story, C. C. 342; *Saltus v. Ocean Ins. Co.* 12 John. 107, and see the other cases cited to this point, *ante*, 195, 196, in note.

² The power of the master to sell the cargo depends on exactly the same principles as the power to sell the ship, and like it, can only be exercised in cases of extreme necessity. *Ante*, 189, and in note, 195. The master is not at liberty, in cases of shipwreck, to sell the cargo merely on the ground that a sale will be the best for all concerned, and that a prudent owner, if present, would sell under the same circumstances, but he will be justified in selling only by a legal necessity. *Bryant v. Commonwealth Ins. Co.* 13 Pick. 543; and see the other cases cited in note to this point, *ante*, 195; *Dodge v. Un. Ins. Co.* 17 Mass. 478. Where a vessel was stranded on the coast of Virginia, and the cargo was landed without damage, and was not of a perishable nature, and might have been kept in reasonable safety until the owners and insurers, who lived in Massachusetts, could be heard from, it was held, that the master

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Right of master to sell, as laid down by Lord Stowell in the *Gratitudine*.

Right (or duty) of master to tranship, as laid down by Lord Denman in *Shipton v. Thornton*.

The general right of the master to sell has been no where better stated than by Lord Stowell in the case of the *Gratitudine*: "Suppose the case of a ship driven into port with a perishable cargo, or suppose the vessel unable to proceed, or to stand in need of repairs: what must be done? The master in such case must exercise his judgment, whether it would be better to tranship the cargo, if he has the means, or to sell it: he is not bound to tranship; he may not have the means of transshipment; but even if he has, he may act for the best in deciding to sell. *If he has not the means of transshipment, he is under an obligation to sell the cargo, unless it can be said that he is under an obligation to let it perish (g):*" and the general right of the master to tranship, even at an increased freight, has since been fully recognized in English law by the case of *Shipton v. Thornton (h)*, and the doctrine stated to be that, in all cases where the original ship is forced into a port of distress, and is there found to be so disabled as to be incapable of taking on her cargo, the master has the right, from his character of agent for the merchant shipper, which is forced upon him by the necessity of the case, to act in the port of distress for the best interests of all concerned; and to this end he has power and discretion conceded to him adequate to the trust, and requisite either for the transshipment and forwarding of the cargo to the port of destination, or, where that is impossible consistently with a due regard to the interests of all concerned, to sell or otherwise dispose of it at the port of distress.¹

The following cases, as far as they relate to the sale by the

(g) Per Lord Stowell in *The Gratitudine*, 3 Rob. 240.

(h) *Shipton v. Thornton*, 9 Ad. & Ell. 314.

had no authority to sell the cargo, and break up the voyage, without waiting until the owners and insurers could be consulted. *Bryant v. Commonwealth Ins. Co.* 13 Pick. 543. See *Scully v. Bridle*, 2 Wash. C. C. 160; *ante*, 196, in note; *Abbott, Shipp.* (6th Am. ed.) 366, in note, 19, in note; *ante*, 1066, in note. Where a case of necessity for the sale of the cargo exists, by the operation of the perils insured against upon the cargo itself, and a sale of the cargo is made under it, and is authorized by it, this is undoubtedly a total loss of the cargo, no less than a sale of the ship is, under similar circumstances, a total loss of the ship. 2 Phill. Ins. 329; *ante*, 1011, and note.

¹ 8 Kent, (5th ed.) 212; *Mumford v. Commercial Ins. Co.* 12 John. 262; *Searle v. Seovell*, 4 John. Ch. 218; *Saltas v. Ocean Ins. Co.* 12 John. 107; *Abbott, Shipp.* (6th Am. ed.) 365, in note.

master, are illustrations of the above principles : as far as they relate to the right to recover as for a constructive total loss, they depend on those already established in the case of the ship.

*It may be remarked, that in most of the cases where the goods sold have been of a perishable nature, they have also been warranted *free of average by the memorandum* : as to this, we must repeat the observation before made, that the warranty, to be free of average, makes no difference in this country (i), in considering whether the loss be, on principle, total or only partial ; although, from the greater interest which the assured has in such cases to convert a partial into a total loss (*as otherwise the warranty would preclude him from recovering any thing*;) the circumstances on which he relies, as proving the totality of the loss, are to be watched with greater suspicion and a closer scrutiny.

One of the first cases in English law where the point arose upon the right to recover as for a total loss by sale of cargo abroad, was *Manning v. Newenham*, in which the insurance was upon a Dutch ship, her freight and cargo, warranted *free of average*, from Tortola to London. The ship, soon after sailing, became so leaky, that she was forced to put back to Tortola in distress, where, on survey, she was found to be in such a state that she could not be repaired, so as to carry on her cargo, either at Tortola or at St. Thomas's, which is the next island, and was accordingly condemned and sold. The cargo, which consisted of sugars, was then examined, and found to be only damaged to a very trifling extent : but there were no ships then at Tortola in which the whole could have been sent on, *though a great part might have been forwarded by two vessels then in the harbor* : instead, however, of forwarding any, the whole was sold by order of the assured at Tortola, where it realized within 700*l* of 12,000*l*., the sum at which it was valued in the policy : two-thirds were bought in on account of the owners, and had not arrived in England at the time of action brought ; under these circumstances the assured, who had given due notice of abandonment, claimed to recover as for a total loss : the jury gave him a verdict for

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It makes no difference as to the right of sale, or the totality of the loss, whether the goods are warranted free from average or not.

Where ship was irreparably disabled, and the whole cargo could not be forwarded — this was held a constructive total loss of cargo, by Lord Mansfield in *Manning v. Newenham*, 3 Doug. 120.

(i) It is different in the United States, loss on memorandum-articles. *Ante*, 1126, where there can be no constructive total loss.

Constructive total loss on goods: where they are sea-damaged, and cannot be forwarded — right of master to sell the cargo.

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Ground of decision. Remarks on *Manning v. Newenham*; ~~as it~~ it cannot be supported as an authority: inability to send on the *whole* cargo will not justify its sale.

A perishable cargo may be sold by the master, if, in consequence of an embargo at the port where it lies, and there being no storehouses there, it must, if not sold, be kept six months on board a leaky ship; and the loss is constructively total. *Milles v. Fletcher*, 232. Dougl.

1126 *

the whole amount, which the court, on motion for a new trial, *refused to disturb. (j) Lord Mansfield put the decision of the court upon this short ground: "The ship has received *an irreparable hurt within the policy: this drives her back to Tortola, and there is no ship to be had there which could take the whole cargo on board.*" (k)

It seems questionable whether, even upon the ground thus stated by Lord Mansfield, the case would now be regarded as an authority; for subsequent decisions have shown, that the mere inability to tranship the *whole* cargo will not make a constructive total loss: though *all the sugars* could not have been sent on by the two ships then at Tortola, yet a considerable portion of them might: it does not appear that any efforts had been made to procure ships elsewhere; nor that the sugars had been so far sea-damaged as to have been in any danger of becoming unmarketable, if kept till such time as ships could have been procured for forwarding them. Upon the whole, therefore, it appears better to consider the case overruled, than to endeavor, by a forced construction, to reconcile it with the more recent authorities.

In the case of *Milles v. Fletcher*, which has been already considered with reference to the sale of the ship, the facts *as to the cargo*, which, as in the last case, consisted of sugars, were these: the captors had plundered part; of that which remained, when the ship was brought into New York by the recaptors, fifty-seven hogsheads were damaged; and the whole, from the leakiness of the vessel, was in a perishable state: in order to repair the ship, it was necessarily landed; but *there were no storehouses in which it could be placed*, and an embargo was laid on at New York, which would, at any rate, have prevented its being sent on to London (its port of destination, where it was to have arrived in July) until December: under these circumstances the master sold the cargo on the spot; *and Lord Mansfield held the sale justified, and the loss constructively total: this decision seems to agree

(j) *Manning v. Newenham*, 3 Dougl. 120. 2 Camp. 623, note (a). Park on Ins. 368, 8th ed. Marshall on Ins. 595. The statement of the facts in these different reports is rather conflicting, especially

as to the condition of the cargo on survey.

(k) Park on Ins. 368, 8th ed.; and see the remarks of Lord Ellenborough on this case in giving judgment in *Anderson v. Wedin*, 2 Maule & Sel. 246.

with all the cases; and indeed the question of Lord Mansfield seems unanswerable. "What, shall a cargo which was intended to arrive in London in July, *be kept in a perishable state at New York, in a leaky vessel, till December?*" (l)

In both these cases Lord Mansfield lays considerable stress upon the *loss of the voyage for the season*, as one of the criteria for determining whether the sale was justified, and the loss constructively total: the two following cases, however, clearly establish the position, *that the mere loss or retardation of the voyage for the season*,¹ owing to the disability of the original ship, and the impossibility of at once procuring others to forward the cargo, *never* gives the right of sale or abandonment in the case of *imperishable* goods, and only does so in the case of *perishable* commodities, when, from the sea-damage they have already sustained, it appears in the highest degree probable that they will be totally destroyed, or spoiled as merchantable articles, if kept at the port of distress till they can be forwarded: in this latter case the master may sell, and the assured abandon, not because the voyage has been lost or retarded, but because, in the language of Lord Ellenborough, "the goods themselves have received some material damage, operating a destruction of the thing insured." (m)

"*Copper, iron, and nails*," were insured, "*free of average*," from London to Quebec. The ship, which sailed late in the autumn, was compelled, by tempestuous weather, to put back and run into the port of Kinsale, where she was surveyed, and found to be so damaged, that she could not be repaired in time to reach Canada that season; nor could any ship be procured, *either in Kinsale or Cork*, in which to send on the cargo till the next spring: on the result of the survey being known, the assured gave notice of abandonment, and the cargo, which *had been only damaged to a very trifling extent*, was sold at Kinsale by their orders. The court held, on the *principles already indicated, that, under these circumstances, the assured could not recover as for a total loss; for this was

Constructive total loss on goods: where they are sea-damaged, and cannot be forwarded — right of master to sell the cargo.

Mere retardation or loss of the voyage for the season is never a constructive total loss on *imperishable* goods, and only so on *perishable* goods, when they are so sea-damaged, that they may be spoiled if kept till they can be forwarded.

Loss of the voyage for the season by the disability of the original ship: held not a constructive total loss, on a cargo of *copper, iron, and nails*.
Anderson v. Wallis, 2 M. & Sel. 240.

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(l) *Miles v. Fletcher*, Dougl. 232.

(m) 5 Maule & Sel. 57.

¹ *Jordan v. Warren Ins. Co.* 1 Story, C. C. 342, cited *post*, 1138.

Constructive total loss on goods: where they are sea-damaged, and cannot be forwarded — right of master to sell the cargo.

Same decision as to a cargo of flour, not being so sea-damaged as to be spoiled by the delay.

Hunt v. Royal Exch. Ass. Comp.
5 M. & Sel. 47.

a mere temporary retardation of the voyage, not at all tending to the destruction of the thing insured. (n)

And the decision of the court was the same in the following case, where the thing insured, *though perishable in its own nature, was yet not, in fact, so sea-damaged as to render it likely to be spoiled*, if kept till it could be forwarded. The insurance was on flour (o), warranted free of average, from Waterford to St. John's, Newfoundland: the ship, as in the last case, had sailed in October, and was compelled to put back, in distress, into Cork, where, on survey, she was found so disabled as to be obliged to be broken up and sold, and the flour, which had been taken out of her and surveyed, was found to be very little damaged, and might have been safely kept at Cork till the spring, when it might have been forwarded to its destination: instead of so keeping it, however, the assured had it sold, and, having given notice of abandonment, claimed to recover as for a total loss: the court, as in the last case, and upon the same grounds, held that the loss was only partial. (p) "Here," said Lord Ellenborough, "was a retardation of the adventure only; it is stated that the cargo could not have been forwarded till next spring, that is, it might have gone then, for it is not to be supposed that at such a port as Cork there would not be some vessel to be found for the next season, to forward the cargo to St. John's — nor can I necessarily infer that the flour would be changed in quality and condition by the delay, from November to April, so as to incur any material damage operating the destruction of the thing insured." (q)

Van Omeron v. Dowick,
2 Campb. 41.

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On the same principle, where a case of cutlasses was sold by the master at an intermediate port, from the impossibility, owing to contrary winds and the necessity of keeping with *convoy, of carrying them on in his own ship to their port of destination, this sale was held not justified (r); and the decision was the same where a cargo of "crates, earthenware, and Indian blues," destined for the African trade, were sold by the master at the Bermudas (whither his ship had been

(n) Anderson v. Wallis, 2 Maule & Sel. 240. flour only (for the pork is out of the question,) warranted free of average," 55.

(o) Pork was also included in the policy; but as to it no question was made.

"This must be considered as a policy on

(p) Hunt v. Royal Exch. Ass. Comp. 5 Maule & Sel. 47.

(q) 5 Maule & Sel. 55.

(r) Van Omeron v. Dowick, 2 Camp. 41.

carried after capture and recapture,) because he had lost all his boats, which are necessary for the barter trade, and could not get a sufficient complement of hands. (s)

On the same ground, it was held that underwriters, on goods insured from London to *Demerara*, were not liable as for a total loss, where the ship, being captured and recaptured, was sent into *St. Thomas*, stripped of all her hands, and the captain, not being able on his arrival there to procure a fresh crew, or otherwise to raise money to pay the salvage, upon this ground, *immediately* (within three days of his arrival) sold the ship and cargo, and broke up the adventure (t) : Lord Ellenborough remarked, that, although he could not at first procure a competent crew, he ought to have waited a reasonable time for that purpose : ships that came in might have spared him assistance, or *seamen might possibly have been obtained from the neighboring island*. "It does not satisfactorily appear that he might not have raised the money by drawing on his owners or hypothecating the ship. Even if the ship was prevented from completing the voyage, it does not appear that the goods might not have been forwarded to their place of destination by other vessels."

The following cases show, that if means of transhipment exist, either immediate or eventual, and the goods can either be at once sent on, or kept for future transhipment, without danger of being spoiled by the progress of decay arising from sea damage, and with the prospect of reaching their destination in a marketable state—the master is bound to tranship or keep them ; at all events, he cannot, by electing to sell, give the assured a right to recover as for a total loss.

*A cargo of wheat was insured, "free of average," from London to Lisbon : the ship was so damaged in the Downs, that she was forced to run into Dover, where, on survey, she was found to be wholly disabled from pursuing her voyage, except at a cost greater than her repaired value : the whole cargo, consisting of 1160 quarters, having been landed, it was found that 400 only were dry, 700 were wetted, but were kiln-dried, and the residue was wholly spoiled : on this state of facts Lord Ellenborough said, (in reference to the case of

Constructive total loss on goods : where they are sea-damaged, and cannot be forwarded—right of master to sell the cargo.

Sale of cargo at an intermediate port, without waiting to see whether the original ship might not have been manned or repaired, or other ships procured to forward it : held not justifiable. *Underwood v. Robertson*, 4 Campb. 138.

Although the original ship be disabled, yet, if means of transhipment exist, either immediate or eventual, and the goods can be either kept or sent on, with a probability of reaching their port of destination in a marketable state—the master cannot sell, nor the assured make it a constructive total loss.

Wilson v. Royal Exch. Ass. Comp. 2 Campb. 623.

* 1129

(s) *Wilson v. Millar*, 2 Stark. 1.

(t) *Underwood v. Robertson*, 4 Camp. 138.

Constructive total loss on goods: where they are sea-damaged, and cannot be forwarded — right of master to sell the cargo.

Though at one time the state of the cargo be such as to justify abandonment, (as in case of submer- sion,) yet, if such right be not then exercised, and part of it be afterwards recovered, so that it can be sent on in a marketable state, the assured cannot sell and recover as for a total loss.

Anderson v. Royal Exch. Comp. 7 East, 38.

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Manning v. Newnham, which had been cited, as in point, for the plaintiff,) "I accede to that case; and if it shall be proved that the voyage here was not worth pursuing, and that there were no means of pursuing it, I think this must be considered a total loss:" as, however, in the further course of the trial, it appeared that at the time of the casualty there was a brig lying in Dover harbor, in which the wheat might have been sent on to Lisbon, Lord Ellenborough said he was clearly of opinion, on this additional evidence, that the action could not be maintained for a total loss. (u)

The following case shows that, though at one time the state of the cargo was such as to give a right of abandonment, yet if the right be not then exercised, and any part of the cargo be afterwards recovered in such a state that it may be sent on in a marketable condition to its port of destination, and there are opportunities of so forwarding it, the assured cannot direct a sale, and treat the loss as constructively total.

Part of a cargo of wheat was insured, "free of average," (but without the exception, unless stranded) from Waterford to Liverpool: in going down the Waterford river the ship struck, and filled so fast that, to save her from sinking, she was run ashore on a bank, where she was completely under water at every high tide: in the course of about a month, by the exertions of the master, the whole of the cargo was got out in a sea-damaged state: of that portion of the cargo which was the subject of the insurance, part was *wholly spoiled, but about two-thirds were kiln-dried, and might have been sent on to Liverpool in a marketable state as wheat, by a vessel, which sailed thither about two months after the casualty, and by which that part of the cargo which belonged to other shippers was actually forwarded. The agent of the assured, however, instead of so forwarding, sold it at Waterford; and the assured brought his action for a total loss. The question of his right to recover was considered mainly with reference to the time at which he had given notice to abandon. Lord Ellenborough, however, plainly intimated that, although the assured might have treated the case as one of total loss while the wheat remained submerged in the water, yet that the

(u) *Wilson v. Royal Exch. Ass. Comp.* 2 Camp. 623.

loss had ceased to be total when the wheat had been in fact got out, and might have been forwarded in a marketable state. (v) On the same ground, in a case where the ship was wrecked at her port of landing, but her cargo, consisting of tobacco and sugars, insured "free of average," was all got on shore and saved, though in a very damaged state, but it did not appear, though the original ship was disabled and obliged to be broken up, that what was saved of the cargo might not have been forwarded in other vessels — Lord Ellenborough and the Court of King's Bench held that the assured, who had abandoned, could not recover as for a total loss. (w)

Constructive total loss on goods: where they are sea-damaged, and cannot be forwarded — right of master to sell the cargo.

Thompson v. Royal Exch. Ass. Comp. 16 East, 214.

§ 395. Although, however, the original ship be capable of repair, or means of transhipment are readily procurable, the master is not bound to tranship, for, as Lord Stowell says, "even in such case he may act for the best in deciding to sell (x):" if the cargo be so damaged, as not to be in a merchantable state at the time of the casualty — if it is certain that, if sent on to its port of destination, it will be destroyed by putrefaction, arising from sea-damage, before arriving there —¹ if, in short, considering the nature and condition of the cargo, and the cost of transhipment, a prudent owner, if uninsured and on the spot, would, in the exercise of a sound discretion, rather sell than tranship, the sale by the master or the assured will be justified, and the latter may recover as for a constructive total loss.²

If, however, the cargo cannot be sent on, with any hopes of arriving in a merchantable state at its port of destination, it may be sold and abandoned, although means may exist for its transhipment.

* 1131

The following cases illustrate this position: — A cargo of sugars was insured, *free of average*, from Liverpool to Calais: the ship was forced to put back to Liverpool in a totally disabled state, and the sugars having been necessarily unloaded, were found, on survey, to be so sea-damaged, that *no part of them was in a merchantable state*, and that they could not have been sent on except as damaged goods, though ships might

Ship driven back, disabled, to her loading port, with a perishable cargo, no part of which, owing to sea-damage, is in a merchantable state — such cargo need not be forwarded, but may be sold and abandoned, though it might easily have been sent for. Gernon v. Royal Exch. 6 Taunt. 367; 2 Marsh. 92.

(v) *Anderson v. Royal Exch. Ass. Comp.* 16 East, 214; and see the comments of Lord Abinger on this case in *case as given by Lord Abinger*, 3 Bingh. Roux v. Salvador, 3 Bingh. N. C. 260. N. C. 260. (z) 3 Rob. 240. See *ante*, p. 1124.

(w) *Thompson v. Royal Exch. Ass.*

¹ *Ante*, 1122, in note.

² *Ante*, 1122, 1123, in note.

Constructive total loss on goods: where they are sea-damaged, and cannot be forwarded — right of master to sell the cargo.

easily have been procured to forward them in that state. Under these circumstances, the sugars were sold at Liverpool, where they *realized within a third of their invoice price*; and the assured, who had given due notice of abandonment, claimed to recover as for a total loss. Chief J. Gibbs told the jury, at the trial, that the assured would not be justified in abandoning, unless the property was reduced to such a state, that *it could not be applied to the original purpose of the voyage*; but that they would be entitled to do so "if it was not in a proper condition for the market: the jury thought the sugars were not in a fit state to be forwarded, and found for a total loss; which verdict the court refused to disturb. (y)

The following case, if, indeed, it *ought not to be put wholly on the ground of an acceptance of the abandonment by the underwriters*, which was mainly relied on by the majority of the court, goes further than any other authority in English law, and seems to show that, although ample opportunities of transshipment exist, and part of the goods are still in a merchantable condition, yet they may be sold and abandoned if, upon the whole, it was better for the interests of all concerned not to forward them. The facts ^{*}of the case were these: a cargo of cape wines, consisting of 241 pipes and 71 hogsheads (of the invoice value of nearly 8000*l.*) was insured (*but without any warranty to be free of average*) from the Cape to Bristol, Liverpool, or Dublin: had the ship arrived safely, the assured intended to have landed 100 pipes at Bristol, and to have sent on the remainder to *Dublin, which was, therefore, the ultimate port of destination*: the ship, however, just before reaching Bristol, was driven by a gale on to the rocks at Portishead, about thirteen miles from that city, where she bulged, heaved over, and, finally lay in such a position, that the whole of her cargo was under water at high tide. The assured, immediately on hearing of the casualty, gave notice of abandonment, and measures were then taken, with the express sanction of the underwriters, to rescue the cargo: the result was, that 229 pipes and 67 hogsheads were got out, of which 71 pipes and 43 hogsheads were *sound and*

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A cargo of wines is saved out of a wrecked ship at one of its ports of destination, and there found to be so damaged, that, though part of it is in a merchantable state, and might easily be forwarded, yet it is better for all concerned to sell it at the port of casualty than to send it on to its port of ultimate destination: *semble*, the sale is justified, and the loss constructively total. *Hudson v. Harrison*, 3 Brod. & Bingh. 97.

(y) *Gerson v. Royal Exch. Ass. Comp.* at N. P. Holt, 52, in Banc. 6 Taunt. 357. 2 Marsh. 92.

full, and 17 pipes and 4 hogsheads were quite empty; the residue had either partially leaked, or were more or less damaged by sea water, *but were not in an unmerchantable state*; and ships might easily have been procured to take them on to Dublin. The parties, however, who had saved the wines, deeming it inadvisable to send them on, advertised a sale, on the day preceding which (being more than two months after the casualty) the underwriters gave notice that they would not sanction such a step, and it was, accordingly, postponed for another month, when, all attempts at negotiation having failed, the wines were finally sold for the gross sum of 4044*l.*, 2*s.* 6*d.* (rather more than half the invoice price,) and for the net sum, after deducting salvage and all expenses, of 2570*l.* 16*s.* 3*d.* *The sale, in the opinion of the witnesses for both parties, had been very fairly conducted, and, under the circumstances, was the best step for the interests of all concerned.* Upon the whole case, the Court of C. Pleas held that the plaintiff was entitled to a verdict for a total loss (z): the majority of the court laid principal stress on the fact, that the conduct of the underwriters amounted to an acceptance of the notice to abandon, and, therefore, fixed the rights of the parties from that time. Mr. J. Richardson, however, put his judgment on the ground (1) that, in this case, there was such a loss, as to give the assured a right of abandonment at the time; and (2) that such right had not been divested by subsequent circumstances: as to the first point he said, "When notice of abandonment was given the ship was on the shore on her side, exposed to the operation of the wind and tide, and at high water the whole of the cargo was immersed in the sea; and it was uncertain whether she might not perish with the rise of every tide:" as to the second point, after remarking generally on the state of the cargo, and the opinion of *all* the witnesses, that a sale was the best measure for all concerned, he added, "It is material to observe, that such part of the wines as were damaged by the salt water *must have become in a more deteriorated state by delay, or by sending them on to Dublin, their final port of destination*:" undoubtedly this last consideration is *material* (a),

Constructive total loss on goods: where they are sea-damaged, and cannot be forwarded — right of master to sell the cargo.

The case was principally decided on an acceptance of the abandonment by the underwriters.

* 1133

Judgment of Mr. J. Richardson.

Remarks on the case.

(a) *Hudson v. Harrison*, 3 Brod. & Bingh. 97. 6 Moore, 268.

(a) See *Roux v. Salvador*, 3 Bingh. N. C. 206.

Constructive total loss on goods: where they are sea-damaged, and cannot be forwarded — right of master to sell the cargo.

Where goods would be *worth nothing* if sent on, and are therefore sold; this is a constructive total loss.

Parry v. Aberdeen, 9 B. & Cr. 411.

Roux v. Salvador, 3 Bingh. N. C. 266.

and may, perhaps, be deemed sufficiently so to reconcile this case, on its facts, with the other authorities, even without putting it exclusively on the ground of an acceptance of abandonment by the underwriter.

Where the original ship is disabled, and perishable goods, saved from her hold, are reduced to such a state by sea-damage that they would have been *worth nothing*, if sent on, and are therefore sold in the foreign port, for less than the salvage, this is a clear case of constructive total loss, especially where there are no procurable means of transhipment. (b)

In such case, in fact, there can be no little question that the assured may recover the whole amount of the insurance, even without notice of abandonment: as it is now settled that he may, wherever the cargo, being necessarily unloaded at an intermediate port for the repairs of the ship, is sold there from the certainty that, if sent on, it will perish before arriving at its port of destination, from the progress of putrefaction, arising from previous sea-damage; and this, *though the original ship is capable of being repaired so as to take on the residue of the cargo, and actually does so. (c)

The cost and difficulty of transhipment, considered with reference to the peculiar nature and actual state of the cargo, is, undoubtedly, a fair circumstance for the master to take into consideration in determining whether to sell or to forward the cargo, as is well shown by the two following cases decided in the United States — A cargo of *coffee, sugar, and tea*, was landed, without damage, after the wreck and total disability of the ship, on the coast of Virginia, about forty miles from the port of Norfolk, to which port the master might have transported it by land, and thence forwarded it to its port of destination by another vessel, at an expense altogether less than one-third of its invoice value: instead of doing so, however, he sold it on the beach for within a fraction of that value: this was held neither to be a rightful sale, nor a case of constructive total loss. (d) On the other hand, where a cargo of *wheat* was saved from a stranded ship, and got ashore much damaged, on an open beach, many miles

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The cost of transhipment as compared with the probable worth of the cargo, if forwarded, is a circumstance fit to be taken into the master's consideration in electing whether to sell or to tranship.

(b) Parry v. Aberdeen, 9 B. & Cr. 411.
4 M. & Ryl. 343.

(c) Roux v. Salvador, 3 Bingh. N. C.
266. 4 Scott, 1.

(d) † Bryant v. Commonwealth Ins.
Comp. 6 Pick. 131, cited 2 Phillips 326.

from the nearest port, to which it must have been transported partly along the beach, and then carried several miles in boats with great hazard, the court held, that these facts justified an abandonment, because the master, as the agent of the assured, was not, in this case, bound to tranship. (e) As Mr. Phillips observes, one ground of distinction between these two cases undoubtedly was the different nature of the respective cargoes, the expense of transporting coffee, sugar, and tea being very trifling, in respect of their value, in comparison with that of transporting grain.

Constructive total loss on goods: where they are sea-damaged, and cannot be forwarded — right of master to sell the cargo.

In such cases the nature of the cargo is also to be taken into consideration.

As we have already seen, one ground of Lord Mansfield's decision in the case of *Manning v. Newenham* was, that, though part of the cargo might have been forwarded by ships which were in port at the place and time of the casualty, yet the whole of it could not: and the same point was afterwards pressed on the attention of the Court of King's Bench (though not adverted to in their judgment) in arguing the case of *Anderson v. The Royal Exchange Assurance Company*. (f) There is now, however, no doubt that this circumstance is not conclusive in determining whether a sale by the master is justifiable, or the loss on goods constructively total; but that if any part of the cargo can be forwarded, with a chance of its arriving in a marketable state, and means exist for its transshipment, it ought to be so forwarded, and cannot rightfully be sold. Thus, where part of a cargo of indigo, shipped from Calcutta for England, was saved, without any material damage, from the wreck of the ship, and landed at the Cape of Good Hope, and there sold by the master, instead of being forwarded, as it very shortly afterwards might have been, by another ship, the court held that, as the jury had found such sale, under the circumstances, not to be necessary, it could vest no title in the purchaser. (g) In this case, indeed, as Mr. J. Best remarks, there was no pretence for a sale, the ship was wrecked in a British possession, the cargo not perishable, nor materially damaged, abundant means of transshipment existed, and it might have, at all events, been warehoused at the Cape till the owner's directions had been

It makes no difference that the whole cargo cannot be forwarded; if any part can be sent on in a comparatively undamaged state, it ought to be transhipped, and cannot rightfully be sold. *Freeman v. East India Company*, 5 B. & Ald. 617.

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(e) † *Treadwell v. Union Ins. Comp.* *prid. Anderson v. Royal Exch. Ass.*
6 Cowen's Rep. 270, cited 2 Phillips, 326. Comp. 7 East, 44.

(f) See *Manning v. Newenham*, *sup.* (g) *Freeman v. East India Comp.* 5 B. & Ald. 617.

Constructive total loss on goods; where they are sea-damaged, and cannot be forwarded — right of master to sell the cargo.

A sale not otherwise justifiable is not made so by a Vice-admiralty decree.

received as to what was to be done with it: the authority of this case has been supported by subsequent decisions under very similar circumstances (*h*); and the position derivable from it must now be taken as undoubted law.

It is equally clear, and is established by the same authorities, that if a sale of the cargo be not otherwise justifiable, it will not be rendered so by being made under the decree of a Vice-admiralty court abroad. (*i*)

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*SECT. IV. *Constructive Total Loss on Freight.*

ART. 1. *In cases of Capture, Seizure, Detention, &c.*

Constructive total loss on freight — in cases of capture, &c.

A constructive total loss on ship and cargo gives a *prima facie* right of abandonment on freight.

§ 396. We have already seen that an absolute total loss on ship and cargo, or, in some cases, on either, involves an absolute total loss on freight; in other words, where the circumstances of the case are such as to make the ultimate earning of freight wholly impossible, no notice of abandonment is requisite in order to enable the assured on freight to recover the whole sum he has insured on that interest. (*k*) On the other hand, where the circumstances are such as to make the ultimate earning of freight highly doubtful, without, however, destroying all hope of eventually earning it, then notice of abandonment may be necessary to entitle the assured on freight to recover as for a total loss on that interest; in a word, a constructive total loss of ship or goods is a constructive total loss on freight.¹

(*h*) *Morris v. Robinson*, 3 B. & Cr. Taunt. 66. *Idle v. Royal Exch. Comp.* 196. 5 Dowl. & Ry. 35. *Cannan v.* 8 Taunt. 755. 3 Moore, 115. *Wilson v. Meaburn*, 1 Bingh. 243. 8 Moore, 127. *Forster*, 6 Taunt. 25. 1 Marsh. 425.

(*i*) *Ibid.*

Robertson v. Marjoribanks, 2 Stark. 573.

(*k*) *Green v. Royal Exch. Comp.* 6 Mount v. Harrison, 4 Bingh. 368.

¹ *Callender v. Ins. Co. of N. Am.* 5 Binney, 525. In *Herbert v. Hallett*, 3 John. Cas. 93, Mr. Justice Kent said; — "It appears to me, that the same peril, and to the same extent, ought to exist, to authorize a recovery on a policy on freight, as on a policy on the ship. If the assured could not recover a total loss on the ship, I see no reason why there should be a recovery on the freight." This was said in a case where a policy being made on freight, from New York to Havana, the vessel was driven ashore at Sandy Hook, and was so much damaged that it required about a fortnight to repair her and fit her for sea. The voyage was relinquished, and the assured demanded a total loss.

"*Primâ facie*," says Tindal, C. J. "the assured has a right of abandoning the freight where there has been a constructive total loss of the ship" (1)¹ but, as in the case of ship and goods, this right is *primâ facie* merely, and the claim of the assured on freight to recover, as for a total loss, depends solely on the question, whether, in point of fact, freight has or has not been earned at the time of action brought.

Constructive total loss on freight — in cases of capture, &c.

But the right to recover for a total loss on freight depends on the question whether freight has been, in fact, earned or not, before action brought.

Thus, there can be no doubt that *capture, arrest, embargo*, or any other peril insured against, the effect of which either is to break up the voyage altogether, or to prevent, or for a very long period suspend, the earning of freight, gives the assured on freight an immediate right to give notice of abandonment *to the underwriters on that interest; and, after giving such notice, he may recover against the underwriters as for a total loss, provided no freight is earned before the commencement of the action. (m)

* 1137

The assured on freight, however, like the assured on any other interest, can only recover after notice of abandonment, according to the actual nature of his damnification at the time of action brought,² and if, before that time, freight, in the event, has actually been earned, his right to recover, as for a total loss, is devested. An insurance was effected on the homeward freight of a ship, which had sailed out in ballast to Riga, under a charter-party: after the greater part of the cargo had been loaded on board at Riga, the ship was seized under the Russian embargo of the 7th November, 1800; the master and crew were taken out and the cargo re-landed: on receiving intelligence of this casualty, the assured gave immediate notice of abandonment, both to the underwriters on freight, and also, on the same day, to the underwriters on ship, with whom he had effected a separate insurance: in May, 1801, the embargo was taken off, the master and crew were released, the original cargo was again put on board, and

Hence, where, on seizure of ship and cargo under an embargo, freight was abandoned, but the abandonment not accepted, and the ship, before action brought, arrived, earning full freight: held that the assured on freight could not recover as for a total loss. *M'Carthy v. Abel*, 5 East, 338.

(1) Per Tindal, C. J. in *Benson. v. East*, 34; and the other cases on the Russian embargo, as collected *post*, p. 1146 -

(m) See *Thompson v. Rowcroft*, 4 1149.

¹ See *Whitney v. N. York Firem. Ins. Co.* 18 John. 208.

² At the time of the abandonment, in the United States. See *ante*, 993, 994, 1057, and in notes.

Constructive total loss on freight — in cases of capture, &c.

the ship arrived with it in this country before action brought, earning full freight. Under these circumstances, Lord Ellenborough held, that the plaintiff could not recover a total loss against the underwriters *on freight*; 1. Because, in fact, there had been no loss at all of freight, as, in the event, it had been fully earned, and therefore no loss could be properly demandable from the underwriters on freight, "who merely insure against the loss of that particular subject;" 2. That if freight could be considered as in any other sense lost to the assured, it had become so by *their own act* in abandoning the ship to the underwriters thereon, with which act, and its consequences, the underwriters on freight had nothing to do. (n)

* 1138

A mere retardation of the voyage gives no right to the assured on freight to recover as for a total loss, if it does not prevent the freight from being ultimately earned. *Everth v. Smith*, 2 M. & Sel. 278.

A mere retardation of the adventure, by a loss of the *voyage for a season, gives no right to the assured on freight to recover as for a total loss, even after notice of abandonment, if it does not prevent the freight from being ultimately earned before action brought.¹

A British ship was chartered to proceed to a port in the Baltic with her outward cargo, there to unload, and then sail, in ballast, to Riga, where she was to load a homeward cargo from the charterer's agents. An insurance was effected generally on *freight* for the *homeward voyage*. The ship, having performed the first part of her voyage according to the charter-party, sailed to Riga in ballast, where she arrived in September, and was immediately seized and detained by order of government, without being suffered to load a cargo. This detention continued till the frost set in, in consequence of which the ship was kept at Riga all the winter, and never got a loading *from the charterer's agents* at all: next spring, however, the master procured a loading *from other persons*, with which, before action brought, he returned to England, and earned full freight. The assured claimed a total loss, but the court held he could not recover. (o)

(n) *McCarthy v. Abel*, 5 East, 368.

(o) *Everth v. Smith*, 2 Maule & Sel. 278.

¹ Underwriters take no risk with regard to the length, retardation, or interruption of a voyage, if it be subsequently resumed, or be capable of being resumed. *Jordan v. Warren Ins. Co.* 1 Story, C. C. 342.

The grounds on which the court proceeded were, that the insurance was on freight generally, *not on any particular freight*. "The underwriter," said Lord Ellenborough, "did not insure that any particular freight should be brought home, but if *any* freight is brought home, a loss has not happened for which he undertook to indemnify the assured. In this case," continued his lordship, "the only inconvenience that has arisen is to be attributed to the *protraction of the adventure*; but that was decided, in *Anderson v. Wallis and M'Carthy v. Abel*, not to constitute a loss. It is certainly *a loss of the particular trade, which the assured had personally in contemplation*, but it is not within the intention of the policy. The mere retardation of the adventure, and the consequent inconvenience and expense arising from it, *are not a substantive cause of loss where the particular thing insured has not received damage*; and whether the freight earned be *the particular freight contracted for by the assured, or a posterior freight, makes no difference: if freight has been fully earned there can be no loss properly demandable by the underwriters.* (p)¹

Constructive total loss on freight—in cases of capture, &c.

Whether the freight earned be the particular freight contracted for, or not, makes no difference to the liability of the underwriter: if any freight be ultimately earned, the assured on freight cannot recover as for a total loss.

* 1139

In a case, indeed, that came before Sir Vicary Gibbs, the year after this decision, that learned person intimated, in the course of the argument, that, "when the freight of a ship is insured, it becomes an insurance on that cargo" (q): but the year following, Lord Ellenborough decided the case of *Barclay v. Stirling*, on the same principle as that laid down in *Everth v. Smith* (r); more recently it has been acted upon by Lord Tenterden (s), and may, therefore, be considered to be as firmly upheld by authority, as it is reasonable on principle.

(p) See 2 Maule & Sel. 284, 286. See (r) *Barclay v. Stirling*, 5 Maule & also the S. P. illustrated in *Barclay v. Stirling*, 5 Maule & Sel. 6.

(s) *Brockelbank v. Sugrue*, 1 Mood. &

(q) In *Green v. Royal Exch. Ass.* Rob. 102.
Comp. 1 Marsh. Rep. 448.

¹ Underwriters cannot avail themselves of a freight earned in a new voyage which they have not insured, by way of recompense for losses on another voyage, which they have insured, and which has already terminated. Thus, where freight was insured at and from New Orleans to Havre, and the ship, meeting with an accident, put back, and another voyage to England was substituted, on which freight was earned; it was held, that the underwriters were not entitled to the freight of the substituted voyage, as in the nature of a salvage freight. *Jordan v. Warren Ins. Co.* 1 Story, C. C. 342.

Constructive total loss on freight—in cases of capture, &c.

Where, however, the expenses of earning freight exceed its amount, its being ultimately earned will not render the loss less than total, except where such expenses are incurred by the assured.

Constructive total loss on freight where ship or goods are sold for sea-damage.

Freight in cases of transshipment.

If, however, freight, though ultimately earned after a valid notice of abandonment, and before action brought, is yet earned under such circumstances that it is of no benefit to the shipowner, because the expenses of earning it exceed its amount, this will not devest his right to recover as for a total loss, except, indeed, in cases where the expenses of sending on the ship, so as to earn freight, were incurred by his directions, or by the master, as his agent. (t)

ART. 2. In cases where the ship is sold or abandoned as irreparable, or the Goods, as sea-damaged and incapable of transshipment.

§ 397. If, in the course of the voyage, the original ship be disabled or lost, so that the master has no power of repairing her, he has, as we have already seen, at all events the right, even if he be not bound, to send on the goods by another ship, if such can be procured;¹ and, on the arrival of the

(t) *Benson v. Chapman*, 6 Mann. & Gr. 792. S. C. reversed in error.

¹ Insurance was effected on freight from Riga to New York. The bulk of the cargo consisted of hemp, and the residue of manufactured goods and iron. The vessel sprung a leak, and put into Kinsale in distress, where, after a survey, she was found incapable of prosecuting her voyage, unless repaired at an expense equal to her value; and the master, with the advice of the merchants and others at Kinsale, sold the hemp at Kinsale, and shipped the residue of her cargo in another vessel to New York, which, however, was not capable of taking more than one third of the hemp, as there was no machinery to pack and stow it in the Russian mode. It was held that the assured were entitled to recover for a total loss of the freight, it not appearing that the goods reshipped for New York had reached that place, or that any freight had been earned. *Saltus v. Ocean Ins. Co.* 12 John. 107. In this case, Mr. Justice Yeates said;—"The policy being on freight, it is urged that the master ought to have sent home the whole cargo by another vessel or vessels. That the master has a right to hire another vessel, and carry on the cargo, so as to entitle him to his freight, has at all times been allowed; and the decision of this court, in *Schieslein v. N. York Ins. Co.* 9 John. 21, establishes the principle, that it is his duty to find another vessel, by which to carry the goods to the place of destination, if it is in his power to do so. It never was intended by this decision, to make it incumbent on the master to procure a vessel elsewhere, out of the port of distress, or out of a port immediately contiguous; and such limitation is perfectly correct, because the extension of this rule, as contended for, would be attended with insurmountable difficulties and embarrassments to masters. In the present case, he would have been obliged to travel sixteen miles, the distance between Kinsale and Cork, and what his conduct ought to be, if the distance had been greater, could not be ascertained. It would be requiring an act, as a duty, the extent of which the master could not, at all times, know or understand. A due regard, therefore, to the protection of masters of vessels, as well as the interest of the assured, renders some limitation indispensable; and that must necessarily be by

*goods at their port of destination, on board such substituted ship, the whole freight is earned which would have been due had they been delivered in the original ship (*u*): as in such cases, however, it is uncertain whether, in the event, any freight will be earned, the assured, on receiving intelligence of the casualty, may give notice of abandonment to the underwriter on freight; and, if the substituted ship does not arrive so as to earn freight before action brought, he will be entitled to recover as for a total loss. (*v*) The mere loss or disability of the original ship, then, if the goods may be sent on in another, although it may give the assured a *prima facie* right of abandonment, does not necessarily involve a constructive total loss of freight.¹

Constructive total loss on freight where ship or goods are sold for sea-damage.

* 1140

If, in such case, the merchant shipper, or his agent at the intermediate port, consents to take the goods as they lie, instead of having them forwarded, freight *pro rata* is due to the shipowner, and the loss on freight is only a partial loss, which will not warrant an abandonment. (*w*)² If, however, under similar circumstances, the master, without any directions from the merchant, necessarily and justifiably sells the goods, in order to prevent them from being destroyed by the rapid progress of putrefaction arising from sea-damage, no

Freight *pro rata*.

Loss on freight, where cargo sold sea-damaged at an intermediate port to prevent its being spoiled.

(*u*) Abbott on Shipping, 323, 324.
{ (6th Amer ed.) 365, and notes. } Ship-

per v. Thornton, 9 Ad. & Ell. 314.

(*v*) See 2 Phillips, Ins. 351.

(*w*) Luke v. Lyde, 2 Burr. 882. 2 Phillips on Ins. 301.

confining the inquiry or search for another vessel, to the same port, and no other, unless it be a port contiguous and at hand. In this case, no vessel could be obtained at Kinsale; he was, therefore, under no obligation to procure one at Cork; and such being the true and correct definition of the master's duty, it was not necessary for the plaintiff to show, that the attempt had been made to procure a vessel at Cork. Admitting, however, that it would be the captain's duty, with an ordinary cargo, to procure a vessel at Cork to send it on, no such obligation could possibly exist in this case, as the situation of the cargo rendered a reshipment improper." See also 3 Kent, (5th ed. 212, 213; Treadwell v. Union Ins. Co. 6 Cowen, 276.

¹ Mr. Chancellor Walworth, in a case in the court of errors, in New York, lays down the principle that, "If the expense of sending on the cargo by another vessel will exceed fifty per cent. of the freight, it is a technical total loss of the freight, which will authorize the assured to abandon. But the only benefit of abandonment, in such a case, is, to throw the risk and expense of collection, and other incidental expenses, upon the underwriter, and to entitle the owner of the freight to recover the whole amount insured, without delay." Amer. Ins. Co. v. Center, 4 Wendell, 45; S. C. 7 Cowen, 564.

² Abbott, Shipp. (6th Am. ed.) 434, in note, 455, in note; Hurtin v. Union Ins. Co. 1 Wash. C. C. 530.

Constructive total loss on freight where ship or goods are sold for sea-damage.

Full freight earned, where master offers to send on goods and the merchant refuses to let him.

Right of master to detain cargo for freight.

1141 *

The assured cannot recover for a total loss of freight, owing to the master's negligence in not detaining the goods for freight.

freight *pro rata* is due, and, as we have already seen, the loss on freight should seem to be total without notice of abandonment. (x) ¹

Where, after the loss of the original ship, the goods may be forwarded in another, and the master offers so to forward them, but the merchant refuses to let him do so, the whole freight is due, and, therefore, of course no question of abandonment can arise. (y) ²

If the damage done to the ship can be repaired,³ within such time as not to spoil the goods by the delay, the master *is bound to repair, and has a right to detain the cargo a reasonable time, until such repairs are finished, unless the full freight is tendered by the shipper of the goods.⁴ If the master waives his right to insist on the full freight under such circumstances, but, instead thereof, permits the shipper to take his goods away, and forward them in another ship, it has been decided in the United States, and apparently on very good grounds, that the shipowner cannot avail himself of the master's laches, by giving notice of abandonment, and recovering as for a total loss against the underwriter on that interest. (z) ⁵

(x) *Vlierboom v. Chapman*, 13 Mees. & Wels. 230.

(y) *Hunter v. Prinsep*, 10 East, 378. 3 Kent's Comm. (5th ed.) 233.

(z) † *Herbert v. Hallett*, 3 John. Cas. 93. † *Griswold v. New York Ins. Comp.*

3 John. 321. † *Clark v. Massachusetts Fire M. Ins. Comp.* 2 Pick. 104, cited 2 Phillips on Ins. 355, 356.

¹ *Ante*, 187, and cases cited in note; *Halverson v. Cole*, 1 Spears, 321, and other cases. Also, see *Hugg v. Augusta Ins. & Banking Co.* 7 Howard, (U. S.) 595, cited *ante*, 1050, in notes; *Whitney v. N. York Firem. Ins. Co.* 18 John. 207.

² *Jordan v. Warren Ins. Co.* 1 Story, C. C. 342; *Abbott, Shipp.* (6th Am. ed.) 450, 451, in note; *Per Kent, Ch. J.*, in *Griswold v. New York Ins. Co.* 3 John. 327, and in *Bradhurst v. Col. Ins. Co.* 9 John. 19, 20.

³ "If," says Mr. Chancellor Walworth, "the assured on ship has a right to abandon the ship when it is injured to a certain extent, the shipper cannot require him to repair for the purpose of sending on the cargo. He can only be required to send it on if another vessel can be procured. A technical total loss of the vessel involves a loss of the freight. By an abandonment of the vessel, she is no longer in a situation to earn freight for the assured. The insurance on freight is an agreement that the perils insured against shall not prevent the ship from earning full freight for the assured on that voyage. If the ship is totally lost, or lawfully abandoned before the voyage is completed, she cannot earn full freight." *Amer. Ins. Co. v. Center*, 4 Wendell, 45.

⁴ *Clark v. Mass. F. & M. Ins. Co.* 2 Pick. 104. And under these circumstances the assured cannot abandon for the freight. *Ib.*

⁵ See *Schieffelin v. New York Ins. Co.* 9 John. 21; *Hugg v. Augusta Ins. & Banking Co.* 7 Howard, (U. S.) 595, cited *ante*, 1050, in notes; *ante*, 772, in notes; *Herbert v. Hallett*, 3 John. Cas. 93; *Bradhurst v. Col. Ins. Co.* 9 John. 17, 20;

"What would be a reasonable time to wait for the repairs," says Chancellor Kent, "cannot be defined, but must be governed by the facts applicable to the place and time, and to the nature and condition of the cargo; a cargo of a perishable nature may be so deteriorated, as not to endure the delay for repairs, or to be unfit and worthless to be carried on." (a)

Constructive total loss on freight where ship or goods are sold for sea-damage.

What is a reasonable time to wait for repairs.

Where the original ship can be repaired in a reasonable time, or the cargo may be sent on in a substituted ship, at a reasonable amount of cost and trouble, and with a fair hope of its ultimately arriving in specie, or in a merchantable state at its port of destination, it has been held in the United States, and apparently on very sound principles, that the master

If master sells the goods, when he ought to forward them, the loss on freight thereby caused cannot be thrown on the underwriter.

(a) 3 Kent's Comm. (5th ed.) 213. { Clark v. Mass. F. & M. Ins. Co. 2 Pick. 104. }

Griswold v. N. York Ins. Co. 3 John. 321; Jordan v. Warren Ins. Co. 1 Story, C. C. 342, was a case of insurance on freight, on a voyage at and from New Orleans to Havre. The vessel was compelled to put back into New Orleans, in consequence of an accident. The cargo, consisting principally of cotton, was so much damaged, that it would require several months to repack it in a condition to be reshipped, and it was sold by the consent of the master and shippers; and the vessel having taken another cargo on board, proceeded on a different voyage. A total loss on freight was claimed. Mr. Justice Story said;—"The ship was repaired, and capable again of taking on board the cargo, at New Orleans, within a reasonable time. The master had a right to require, that it should be so taken on board and carried on the voyage, as soon as it should be in a condition to be safely reshipped. He had a right to wait until the cargo could be dried, sorted, repacked, and prepared for reshipment. The delay, arising thereby, would be a mere retardation, or temporary interruption, or suspension of the voyage, and not an utter prostration or destruction of it. If, then, the freight has been lost, it has been lost by his own voluntary act, and not by the necessary operation of any of the perils insured against. We must here take the case to be, what it really was, a mutual voluntary agreement on the part of the master and shippers, that the damaged cargo should be sold. The sale must, therefore, be treated as a sale, reserving all the rights of the respective parties." He, therefore, decided, that the underwriters were not liable for loss of freight on the articles so sold. *M'Gaw v. Ocean Ins. Co.* 23 Pick. 405, was a similar case. A ship laden with tobacco and corn on freight, and bound from New Orleans to Havre, was injured by the perils of the seas, and a part of her cargo damaged, and she returned to New Orleans for repairs. There was reason to believe she could be refitted for sea in three or four months. The cargo could not be sent on in another vessel at a lower rate of freight, and the master delivered it up to the shipper, and it was held, that the insurers on the freight were responsible for the loss of the freight on the portion of the cargo which was wholly destroyed, but that they were not responsible in respect to the sound portion, because the master was not bound to give it up without receiving full freight on it, but might have retained it, to be transported in his own vessel, nor in respect to a portion of the cotton which was sold by the master at New Orleans, in consequence of its being wet by sea-water, although cotton in that condition is liable to spontaneous ignition. *M'Gaw v. Ocean Ins. Co.* 23 Pick. 405.

Constructive total loss on freight where ship or goods are sold for sea-damage.

Even though it may be most for the merchant's interest to sell instead of forwarding.

1142 *

ought to send it on, and is not justified in selling; and that the shipowner will not be entitled on the ground of the master's negligence or improper conduct, in selling the goods instead of forwarding them, to give notice of abandonment, and recover as for a total loss on freight. (b) ¹

So, in the case of *Mordy v. Jones*, where the original ship, after putting back to refit, had been repaired so as to be *capable of taking on the goods, and the goods, though sea-damaged, were capable of being forwarded, though not without involving a considerable delay and an expense equal to the freight, it was decided in this country that the master could not, by selling instead of taking them on, entitle the shipowner to throw the loss of their freight on the underwriter. (c) ²

In these cases, in fact, the master has a right, if he can repair the original ship in a reasonable time, or offers and is ready to send on the goods in another ship, to insist either on keeping or taking on the goods, or on being paid his full freight: whether it would have been wise or foolish in the merchant to have sent on his goods, under all the circumstances of the case, is a question which cannot affect the relative rights of the *assured*, and the *underwriter on freight*, the latter of whom can never justly be made responsible for any loss on freight arising from the neglect or laches of the assured, or of the master as his agent. (d) ³

If the master, instead of sending on the cargo in another vessel, or selling it where it lies, repairs the original ship on bottomry, and the repaired ship subsequently arrives before action brought, earning full freight, but subject to a lien

If the master, instead of selling the original ship, and sending on the goods in another, repairs on bot-

(b) † *Saltus v. Ocean Ins. Comp.* 12 John. 107, cited 2 Phillips on Ins. 352. † *Bradhurst v. Columbian Ins. Comp.* 9 John. 17, cited 2 Phillips, 354. † *Griswold v. New York Ins. Comp.* 1 John. Rep. 205. 2 Phillips, Ins. 355.

(c) *Mordy v. Jones*, 4 B. & Cr. 494. *Brockelbank v. Sugrue*, 1 Mood. & Rob.

102. In the case of *Mordy v. Jones*, the merchant had himself consented to the goods being left behind and sold, as the best step under the circumstances.

(d) See the case of † *Griswold v. New York Ins. Comp.* 1 John. 205. 3 Ib. 321, cited 2 Phillips 355.

¹ See *M'Gaw v. Ocean Ins. Co.* 23 Pick. 405, cited in next preceding note.

² See *M'Gaw v. Ocean Ins. Co.* 23 Pick. 405.

³ See *Bradhurst v. Col. Ins. Co.* 9 John. 20; *Hugg v. Augusta Ins. & Banking Co.* 7 Howard, (U. S.) 595; *Jordan v. Warren Ins. Co.* 1 Story, C. C. 342, 352, 353; ante, 772, in note; *M'Gaw v. Ocean Ins. Co.* 23 Pick. 405.

under the bottomry bond to an amount greater than the joint value of the ship as repaired, and the freight as earned, it has been a question whether this is a constructive total loss on freight, so as to entitle the assured, who has given timely notice of abandonment, to recover the whole amount of the insurance. The point arose upon the following facts: the freight of a general ship was insured for a homeward voyage from Pernambuco to Liverpool: the ship received such damage in coming out of Pernambuco harbor, as to be totally disabled for the voyage without repairs: the master, instead of selling, repaired the ship on bottomry, and afterwards brought her on to Liverpool, where she arrived before the commencement of the action, earning full freight, but, burdened with a charge on the bottomry bond, which exceeded the joint amount of the ship's value as repaired, and of the freight earned: the plaintiff, who had given due notice of abandonment on first hearing of the probable expense of repairs, allowed the ship to be sold and the freight paid over on behalf of the obligees on the bottomry bond, and then sued the underwriters on freight as for a total loss: when the case first came before the Court of Common Pleas, that Court held, (on the authority principally of *Holdsworth v. Wise*,) that this was a constructive total loss on freight (e): the Court of Exchequer Chamber, however, reversed the judgment: we have already seen the grounds of their decision as to the ship: with regard to the *freight*, they said, that, as the voyage was, in fact, completed, and the ship arrived safely earning freight, it could not be said that the loss on freight was total, even though the master might have acted erroneously in repairing: "whether," said Mr. B. Parke, in giving the judgment of the court, "there were or were not circumstances in which the owners might have been at liberty to treat the loss as total, give up the adventure, and so cause a total loss on freight, yet, as the adventure was not, in point of fact, abandoned, the total loss on freight has not arisen. But then it is argued that freight, *though earned*, has never been *received by the plaintiff*, but went to the obligee of the bottomry bond: but the obligee of such bond appears to us to be just in the same situation, as the assignee of the freight by trans-

Constructive total loss on freight where ship or goods are sold for sea-damage,

tomry, and the repaired ship arrives, before action brought, earning full freight, but subject to the lien of the lenders on bottomry to a greater amount than the joint value of ship and freight, the assured on freight cannot recover as for a total loss.
Benson v. Chapman,
6 M. & Gr. 792.

* 1143

Judgment of the Court of Exchequer Chamber.

(e) *Benson v. Chapman*, 6 M. & Gr. 792. r

Constructive total loss on freight where ship or goods are sold for sea-damage.

1144 *

If underwriter on freight has paid a total loss, on hearing of the ship's being cast away, and great part of the original cargo lost, he is entitled to the freight ultimately earned by the arrival of the repaired ship with another cargo.
Barclay v. Stirling,
 5 M. & Sel. 6.

fer from the plaintiff himself, would have been ; and there is no doubt that the receipt by such an assignee would be a receipt by the plaintiff himself : if, instead of borrowing by *the masters agency* on bottomry, the plaintiff himself had borrowed for the repairs and mortgaged the freight, the case would have been similar : we think, therefore, that the plaintiff is in the same situation as though he had received the freight himself." (f)

*We have already had occasion to observe, that an insurance on the freight of a ship for a given voyage is an insurance on any freight that may be earned by the ship in the course of such voyage, and not only on the freight of the cargo first shipped on board. This principle is illustrated by the following case : an insurance was effected on the homeward freight of a general or seeking ship, for a voyage from her ports of loading in Jamaica to her ports of discharge in the United Kingdom, with an extensive liberty to discharge, exchange, and take on board, goods at any of the British and foreign West India islands : the ship, having sailed with a cargo loaded for Jamaica, was, in the course of her voyage, driven ashore on the coast of Cuba, where the greater part of her original cargo was washed out of her : she was then taken round to the Havana, where a fresh cargo was loaded on board, and with this, together with what remained of her original cargo, she proceeded to England and earned freight. The court held that the freight so earned, after deducting the expenses of earning, vested in the underwriters on freight, who had accepted a notice of abandonment and adjusted a total loss. (g)¹

ART. 3. *Effect of an Abandonment of Ship upon the Underwriters on Freight.*

Constructive total loss on freight — effect of abandonment of ship on freight.

§ 398. The effect of an abandonment on freight to the underwriters on that interest, when there is a separate in-

(f) MS. and from the short-hand writer's notes of the judgment. See S. P. *Brookelbank v. Sugrue*, 1 Mood. & Rob. 102.

(g) *Barclay v. Stirling*, 5 Maule &

¹ See *Jordan v. Warren Ins. Co.* 1 Story, C. C. 342, cited *ante*, 1139, in note.

insurance and a separate abandonment on the ship, was long a subject of vexed discussion in this country, but seems now to have been finally set at rest. The case supposed is, that the ship is insured with one set of underwriters, and the freight with another; a constructive loss on ship takes place, which gives the assured a right to abandon, and he, accordingly, abandons the ship to the underwriters on ship, and the freight to the underwriters on freight: the ship, after *the abandonment has been made, and accepted by both sets of underwriters, arrives and earns freight: the question is, which set of underwriters shall take the benefit of the freight so earned? The question was litigated before the English courts, a long time before it was finally decided, in several cases, most of which arose out of the Russian embargo of 1800, and are, therefore, known in insurance law as the Russian Embargo cases.

In the first of these cases the facts were, that the owner of a *chartered* ship, which he had sent out to Riga for a cargo of masts, and with which she was to return to Portsmouth, insured the *ship* with one set of underwriters, and the *freight*, for the homeward voyage with another set of underwriters. On the 7th November, 1800, the ship, after part of the cargo was on board, was seized under the Russian embargo of that date, the master and crew were marched up the country, and the cargo shipped was re-landed: the assured, on hearing this, abandoned ship and freight to the respective sets of underwriters, who respectively adjusted with him as for a total loss, he binding himself, by an endorsement on both policies, to make an assignment to each set of underwriters of all his interest and right in any thing that might be ultimately restored for their benefit. In May, 1801, the embargo was taken off, the master and crew released, the same cargo re-loaded on board, and the ship arrived, earning freight, which the assured received according to the terms of the charter-party. No assignment having been executed by the assured, the *underwriters on freight* brought their action against *him*, to recover the freight thus earned and received by him, as money had and received to their use. (A) Lord Ellenborough, without going into the

Constructive total loss on freight — effect of abandonment of ship on freight.

Where freight is insured with one set of underwriters and ship with another, and a separate abandonment is made to each, does the abandonnee of ship take the whole of the freight pending at the time of the casualty and ultimately earned by the ship's arrival?

* 1145

Where, in such case, the assured, in consideration of being paid a total loss, agrees to assign to the underwriter on freight all his interest in any future salvage, such underwriter, on having paid a total loss, may recover from the assured any freight that may ultimately be earned. *Thompson v. Rowcroft, 4 East, 34.*

(A) Besides the indebtedness counts, there were two special counts setting forth all the facts as above stated.

Constructive total loss on freight — effect of abandonment of ship on freight.

1146 *

The assured cannot recover a total loss against the underwriters on freight, in cases where freight is ultimately earned, and only lost to the assured by his previous abandonment to the underwriter on ship. *M'Carthy v. Abel*, 5 East, 398.

After abandonment of a general seeking ship to the underwriters on ship: *semble*, there can be no abandonment to the underwriters on freight. *Sharp v. Gladstone*, 7 East, 24.

1147 *

general question, as between the two sets of underwriters, held that the plaintiffs in this action were, at all events, entitled to what they claimed, by virtue of the specific contract made with them *by the assured, and by which he was bound. (i) Very shortly afterwards, a case — of which the facts were substantially the same, except that the ship was not a chartered, but a *general*, ship — received the same decision from the Court of Common Pleas. (j)

In *Macarthy v. Abel*, which was a case of the same kind, and arising out of the same embargo, *the parties were different*; in that case the assured, on first hearing of the detention, abandoned ship and freight to the respective sets of underwriters on the same day, and executed a deed of assignment of all his interest, right, and property in the ship to trustees, for the benefit of the respective underwriters: the ship, as in the two former cases, having arrived earning full freight, such freight, *minus* the expenses of earning it, was paid over, under an indemnity to the underwriters *on ship*: and the underwriters on *freight* having refused to pay, the assured brought his action against them, on the policy, for a total loss: Lord Ellenborough, as we have already seen, held that he could not recover, 1. Because the freight insured had, in fact, not been lost, but earned; 2. That if, in any sense, it had been lost *to the plaintiff*, it was so, owing not to any of the perils insured against, but by his own act in abandoning to the underwriters *on ship*, with the consequences of which act the underwriters on freight had no concern. (k)

In the next of these Russian embargo cases, the ship (which was a *general or seeking ship*) was first abandoned to the underwriters on ship, and then the freight to the underwriters on freight: the question as to the conflicting rights *of the two sets of underwriters was not submitted to the

(i) *Thompson v. Rowcroft*, 4 East, 34.

(j) *Leatham v. Terry*, 3 Bos. & Pull. 479.

(k) *M'Carthy v. Abel*, 5 East, 398.

The ship, in this case, was a *chartered* ship. Chief J. Tindal seems to have lost sight of the principle established by this case, when he said, in *Benzon v. Chapman*, "that the assured has sustained a total loss on *freight* if he abandons the ship to the underwriters on ship, and is

justified in so doing; for, after such abandonment, he has no longer the means of earning freight, or the possibility of recovering it, if earned, such freight going to the underwriter on ship." 6 Mann. & Gr. 810. The answer is, that such abandonment of ship was his own act, with the consequences of which the underwriters *on freight* have nothing to do. See as to this, *Benecht Pr. of Indem.* 397, 398.

court: had it been so, Lord Ellenborough and the other judges intimated a very strong opinion, that, after an abandonment of ship to the underwriters on ship, the freight, being the earnings made by the subsequent use of that which had then become the property of others, could not be abandoned to another set of underwriters, especially in the case (as this was) of a *seeking* ship, where it seemed impossible to separate the character of owner of *the ship* from that of owner of the *freight*: as, however, the only question before the court was the amount which the defendant was entitled to deduct as the expenses of earning freight, (as to which the case will be considered presently,) they gave no opinion upon the general question. (l)

Constructive total loss on freight — effect of abandonment of ship on freight.

In the next case, the attempt to bring the general question before the court was defeated by a technical objection: the action having been brought by the *underwriter on the freight*, not against the party to whom the freight earned by the ship had been paid over, with the concurrence of both sets of underwriters, as stake-holder, but against the assured. (m)

Ker v. Osborn, 9 East, 378.

At length, however, the question was brought fully and fairly before the court, on the following state of facts: —

The defendant (shipowner) had insured a *general seeking ship* with one set of underwriters, and afterwards her *freight* with another set of underwriters, by two separate policies. The ship having been captured in the course of the voyage, the defendant gave immediate notice of abandonment to both sets of underwriters on the same day, which notice they respectively accepted. Afterwards, the ship, having been re-captured, arrived, earning freight; and the two sets of underwriters settled with the defendant as for a total loss, under an agreement that the ship should be sold, and the defendant hold the proceeds of her sale, and, also, the freight actually earned, for the use and benefit of the parties legally entitled thereto: the money realized by the sale having been paid over to the underwriters on ship, they now further claimed to recover from the defendant the amount of the **freight held* by him, under the agreement already mentioned. A majority of the Court of King's Bench held that they were entitled to

A. insures *ship* with B., and *freight* with C., and makes two separate abandonments on the same day, of ship to B., and of freight to C.: held that the abandonment of the ship to B. vested in him all the freight ultimately earned by the ship. Case v. Davidson, 5 M. & Sel. 79; S. C. in error, 2 Brod. & Bingh. 379; 3 Moore, 116.

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(l) Sharp v. Gladstone, 7 East, 24.

(m) Ker v. Osborn, 9 East, 378.

Constructive total loss on freight — effect of abandonment of ship on freight.

Grounds on which the majority of the court rested their judgment.

recover (n); and this judgment was confirmed by the Court of Exchequer Chamber. (o)

In the Court below, the grounds on which Lord Ellenborough, Mr. J. Abbott, (afterwards Lord Tenterden,) and Mr. J. Holroyd rested their judgment were mainly these: that an abandonment to the underwriter on ship transfers to him *not merely the hull, but the use of the ship, and the advantages resulting from the completion of the voyage*, that, as abandonee of ship, "he has all the rights of the shipowner cast upon him by operation of that emphatic word, in the law merchant, 'abandonment,' and, being so entitled, has a right, if he uses the ship for completing the voyage, to her earnings, as against all the world;" that it is a principle clearly established, that if the ship be sold, the vendee is entitled to freight as an incident to the ship; *that abandonment is equivalent to a sale of a ship, and, therefore operates a complete transfer of all rights consequent upon a sale, including freight*. Upon these grounds, they held that the plaintiff, as abandonee of ship, became entitled immediately to all the freight ultimately earned, as a necessary consequence of the abandonment, and was, therefore, entitled to recover the amount he claimed. (p)

Grounds on which Mr. J. Bayley dissented.

Mr. J. Bayley dissented from the rest of the court on the grounds, that, when ship and freight are separately insured, they ought to be considered to the termination of the adventure as separate subjects; that an abandonment of ship, where freight has been separately insured and separately abandoned must, from the nature of an abandonment, and the constant practice that had prevailed of insuring freight separately, imply a virtual exception of the freight; *that the underwriter on ship insures only the body, tackle, and apparel of the ship, and has, therefore, no right to expect, from an abandonment, more than he has insured*; that great inconvenience might result from the sale, — as, suppose the ship to have performed nine-tenths of her voyage at the time of abandonment, the underwriter on ship would receive the whole benefit

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(n) Case v. Davidson, 5 Maule & Sel. 79.

(p) See 5 Maule & Sel. 82-84, 86-90.

(o) Davidson v. Case, 2 Brod. & Bingh. 379. 3 Moore, 116. 8 Price, 542.

and earnings of the voyage, although he is only at a few days' expense for provisions. (q)

The Court of Exchequer Chamber, in affirming the judgment of the court below, put their decision on the ground that, as abandonment was only a different term for assignment, and the same thing in effect, and as in every other case the assignment of ship vested in the assignee a right to the freight earned thereby, so it would, also, where ship and freight were separately insured and separately abandoned, unless in this case the general effect of an assignment of ship could be shown to be modified by any agreement, either express or implied, between the parties, or by general usage; — that nothing of the kind being shown, (the case only amounting to claim on one side, and resistance to such claim on the other,) the contrary was to be presumed, and there was consequently no reason why, in this, as in every other case of assignment, an abandonment of the ship should not vest in the abandonees a title to the freight earned by her. (r)

The result, therefore, of the English jurisprudence on this point must be taken to be, that, in case of separate insurance and abandonment of ship and freight to different sets of underwriters, the underwriters on freight take nothing by the abandonment, but *the whole freight pending at the time of the casualty, and ultimately earned by the ship on arrival, is transferred to the abandonees of the ship as an inseparable incident thereto.* (s)

This rule of law is avowedly based on the principle, that freight is inseparably incident to the ship, just as rent is to the reversion, so that a transfer of the ship necessarily conveys to the transferee a right to all the freight which she is in the course of earning, at the time from which the transfer takes effect, or may earn subsequently (t): although, indeed,

Constructive total loss on freight — effect of abandonment of ship on freight.

Grounds of the decision of the Court of Exchequer Chamber.

Result of English jurisprudence.

Principles on which the English doctrine rests — that freight is inseparably incident to the ship, and necessarily passes with it on transfer.

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(q) Per Bayley, J. 5 Maule & Sel. 84-86.

(r) See the judgment of the court as delivered by Dallas, C. J. 2 Brod. & Bingh. 364-367. 5 Moore, 125-129.

(s) In Case v. Davidson the underwriter claimed and recovered the whole freight; nor was any distinction taken between the freight accruing prior and subsequent to the loss, or prior and subsequent to the abandonment. See 3 Kent's Comm. (5th ed.) 333, note (a).

(t) Chinnery v. Blackburn, 1 H. El. 117, notes. Morrison v. Parsons, 2 Taunt. 407. Dean v. M'Ghie, 12 Moore, 185. This principle is also well developed by Emerigon, who compares the sale of ship to the sale of an orchard, and says that the right to the pending freight is as much transferred in the one case, as the right to the hanging fruit in the other. Chap. xvii. sect. 9, vol. ii. p. 256, ed. 1827.

Constructive total loss on freight — effect of abandonment of ship on freight.

The freight transferred by the abandonment is the whole freight pending at the time of the casualty, and ultimately earned by the ship.

But the abandonment does not transfer freight earned *pro rata*, or by actual delivery of part of the cargo under the terms of the charter-party before the casualty.

in the case of a chartered ship, the transferee would not have the right of suing for the freight on the charter-party, except in the names of the transferors. (u)

The freight transferred by the abandonment, is *the whole freight pending at the time of the casualty, which gave occasion to the abandonment, and ultimately earned by the ship*: this follows from the principles — 1. That an abandonment, if accepted and effectual, clothes the abandonee with all the rights of ownership from the moment of the loss that gave the right to abandon, and substitutes him from that time in the place of the assured (v); 2. That freight earned under an entire contract is never apportionable, except by express stipulation, (as where it is agreed that a portion of the freight shall be paid on the ship's arrival at an intermediate port,) or by act of the parties (as where the merchant shipper agrees to take his goods at the port of distress, in which latter case, freight *pro rata* is due.)

If, in point of fact, some freight has been earned *before the casualty took place*, by payment of part, or delivery of part of the cargo, under the terms of the charter-party, at an antecedent port, or by an agreement between the shipowner and the merchant, whereby freight, *pro rata*, has become due on part of the goods, it should seem that the freight so paid, or so apportioned, would not vest in the abandonee of the ship.

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*The point has never been raised for direct decision in our courts; but seems indirectly to have been disposed of in the case of *Luke v. Lyde*, where a shipowner, who had insured his ship, *but not the freight*, and had abandoned to the underwriter on ship, was allowed to recover against the shipper of the goods *pro rata* freight, which had become due upon them before the casualty, which gave the right to abandon; and this, although the objection was taken that he was precluded of his action by the abandonment. (w) When this case was cited in *Tompson v. Rowcroft*, Mr. J. Le Blanc remarked, "*that was freight already earned at the time of the abandonment.*" (x)

(u) *Splidt v. Bowles*, 10 East, 729.

(v) Emerigon, chap. xvii. sect. 6, vol. ii. p. 232, ed. 1827, and *ibid.* 233, goes further, and says it makes the abandoner owner from the commencement of the

risk (*des le principe*); but this seems incorrect. See *post*, Chap. IX. Sect. VII.

(w) See *Luke v. Lyde*, 2 Burr. 862.

(x) Per Le Blanc, J. in *Tompson v. Rowcroft*, 4 East, 44.

On the whole, therefore, the doctrine of our law on this subject seems to be—1. That the *whole freight pending at the time of the disaster*, and subsequently earned by the ship, is, by virtue of the abandonment, absolutely and entirely vested in the abandonnee of ship; 2. That consequently if the entire freight for the voyage be *then* pending, the whole is transferred by the abandonment: if however, a portion of the freight have been previously earned under the terms of the charter-party, as by delivery of part of the cargo at an intermediate port, or if freight, *pro rata*, have become due before the loss, such previously earned portions of the freight would not, it seems, be transferred by the abandonment of the ship. (y)

In Case *v. Davidson* Mr. J. Bayley intimated (and Mr. Benecké strongly supports the same view) that, from this state of the law, it necessarily follows that an underwriter on freight, who has accepted an abandonment of freight and adjusted as for a total loss, would be entitled to recover back from the assured the freight ultimately earned (z): and, indeed, this conclusion seems unavoidably to follow, unless it *can be supposed that the assured is to be allowed, by abandoning the ship, to transfer to a third party those rights to which the underwriter on freight would otherwise be entitled as abandonnee of the freight, and thus to make the latter liable for loss originating, not in the perils insured against, but in the act of the assured himself. Accordingly, in a case where the claims of the abandonnee of ship were not enforced, it has been decided in this country, that the abandonnee of freight, who has adjusted a total loss, may claim from the assured, as salvage, any freight ultimately earned, less the necessary expenses of earning it. (a)

The practical result of this state of the English law seems to be, that ship and freight should be made the subject of one and the same insurance, or that, when separately insured,

Constructive total loss on freight—effect of abandonment of ship on freight.

Recapitulation.

From this state of the law, it seems to follow that the underwriter on freight who has settled and paid for a total loss will be entitled to recover back from the assured the proceeds of freight ultimately earned.

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He may clearly do so where the rights of the abandonnee of ship do not interfere.

As a practical rule, ship and freight should be insured in distinct policies; if in one policy, then with specific clauses.

(y) The law in France is now settled to be the same. (See *post*.) In England and the United States, Mr. Phillips says, "it is always taken for granted that an abandonment of the ship does not include such freight." Vol. ii. p. 450.

(z) Per Bayley, J. 5 Maule & Sel. 85. Benecké, Pr. of Indem. 410.

(a) *Barclay v. Stirling*, 5 Maule & Sel. 6.

Constructive total loss on freight—effect of abandonment of ship on freight.

In the United States the whole freight in such case is apportioned *pro rata* into freight earned *before*, and freight earned *after*, the casualty: the former goes to the underwriter on freight, the latter to the underwriter on ship.

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This doctrine seems preferable to our own: illustration of its practical working in the United States.

clauses should be introduced for an equitable apportionment of the freight salvage. (b)

§ 399. Our law, although it must, for the present, be taken to be fixed by *Davidson v. Case* (c), seems undoubtedly to present the anomaly, "that the assured on freight may, by making a distinct contract with a third party, deprive the underwriter on the freight of the salvage to which he would have been entitled had no such contract been made." (d) In the United States this inconsistency is sought to be avoided by making an apportionment of the freight earned, partly before, and partly after, the event for which the abandonment on ship is made. The rule there has long been understood to be, that, on an accepted abandonment of the ship, the freight earned previous to the loss is to be retained by the shipowner, or by his representative, the underwriter on freight, to whom it has been abandoned, and that only the *freight earned subsequently to the time of loss vests in the abandonee on ship. (e)

It certainly seems that this rule is more free from objections than our own; nor does there appear to be any great difficulty in its practical application. Thus, in a case where ship and freight had been abandoned to the respective sets of underwriters, on account of the capture of the ship after she had performed *eight-ninths* of the voyage insured, the court held that the underwriters on the *freight* were entitled, in

(b) See the remarks of Ch. J. Dallas in *Davidson v. Case*, 2 Brod. & Bingh. 387; and see *Benecké, Pr. of Indem.* 413.

(c) The Case of *Stewart v. Dennistoun*, in the House of Lords (not yet decided there) appears to open afresh the whole question: should judgment be given in this case before these sheets go through the press, it will be given in the Addenda.

(d) 2 Phillips on Ins. 438.

(e) 3 Kent's Comm. (5th ed.) 332, and see the cases cited by him, of which the principal are,—† *United Ins. Comp. v. Lenox*, 1 John. Cas. 377; 2 John. Cas. 443; † *Marine Ins. Comp. v. United Ins. Comp.* 9 John. Rep. 186. ‹ See *Davy v.*

Hallett, 3 Caines R. 20. *Livingston v. Col. Ins. Co.* 1 John. 438. *Coolidge v. Gloucester Ins. Co.* 15 Mass. 341. *Simonds v. Union Ins. Co.* 1 Wash. C. C. 443. *Abbott Shipp.* (6th Am. ed.) 470, in note. *Hammond v. Essex Fire and Mar. Ins. Co.* 4 Mason, 196. *Kennedy v. Balt. Ins. Co.* 3 Harr. & John. 367. ‹ See also all the cases collected and commented on in 2 Phillips on Ins. 440–464. The law indeed in the United States seems hardly yet definitively settled, for Chancellor Kent cites a case in which the point was raised, but not decided, whether the abandonee on ship took the *entire* or only a *pro rata*, freight. † *Armroyd v. Union Ins. Comp.* 3 Binn. 437.

virtue of the abandonment, to all the vessel's earnings previously to the casualty, — that is to say, *eight-ninths*, and those on the ship to the remaining *ninth*. (*f*) This case is almost identical with that put by Mr. J. Bayley, in order to illustrate the unfairness of the English rule; according to which the underwriter on the *ship*, in such case, would receive the whole benefit and earnings of the voyage, although he would only be at a few days' expense for provisions, &c. (*g*)

Constructive total loss on freight — effect of abandonment of ship on freight.

In France, where insurances on pending freight (*fret à faire*) are prohibited, the question cannot arise as between the two sets of underwriters: but the general question as to the effect of an abandonment of the ship on pending freight has given rise to a great deal of embarrassed litigation. The Ordinance of 1681 had no specific regulation on the point, and the tribunals denied to the underwriter on ship any freight for the goods saved. Valin exposed the error, and maintained that an abandonment of the ship ought to carry with it all the freight pending, and in the course of being earned, at the time of the casualty, whether stipulated to be paid in advance or not; *but not freight actually earned*; as, for instance, where the freight of the outward passage having *been earned and paid, the ship is lost on her passage home. (*h*) Emerigon examines the question on general principles, and concludes, with regard to the freight in the course of being earned at the time of the casualty, that this passes to the abandonee of the ship just as the fruit growing in an orchard passes, on sale, to the vendee of the orchard: with regard to freight actually earned before the casualty, he admits that this seems to stand in the same predicament with fruit gathered before the sale of the orchard, and which, of course, would not pass to the vendee; but, finally, he determines that this freight also goes to the abandonee on ship, on the ground that the effect of an abandonment is entirely to substitute the abandonee in place of the assured from the beginning of the adventure, so as to make him proprietor of the ship and all its earnings from *the commencement of the risk*, and not only from *the time of the casualty*. (*i*) And the

Law in France as to the effect of an abandonment of ship on freight.

Opinion of Valin;

* 1154
Of Emerigon.

(*f*) † *Leavenworth v. Delafield*, 1 art. 15, vol. ii. pp. 263–266, ed. Becane, Caines, 578, cited 2 Phillips, Ins. 460. art. 47. *Ibid.* p. 309.

(*g*) In Maule & Sel. 86.

(*i*) Emerigon, chap. xvii. sect. 9 vol. ii. p. 256, ed. 1827. The whole section deserves an attentive perusal.

(*h*) Com. Liv. 3, tit. vi. des Assurances,

Constructive total loss on freight — effect of abandonment of ship on freight.

Ordinance of A. D. 1779.

Code de Commerce, art. 396.

Freight paid in advance upon the goods that ultimately arrive passes to the abandonnee of ship; but the freight of goods landed previous to the casualty does not.

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law was so settled by the Chamber of Commerce of Marseilles in 1778. The Ordinance, however, of the ensuing year (1779) did not follow this doctrine, but declared that acquired freight (*fret acquis*) already earned on the voyage was insurable, and did not go with the ship on abandonment, but that the freight ultimately earned on the goods saved would go to the insurer, if there was no stipulation to the contrary. (j) The Code de Commerce enacts that the freight of the goods saved (*fret des marchandises sauvées*) shall, on abandonment, vest in the abandonnee on ship, *even though it may have been paid in advance*. (k) The meaning of these latter words has been the subject of litigation before the French tribunals: it has been expressly laid down by the Cour Royale of Rennes (l), and confirmed by the Cour de Cassation (m), that they relate only to such portion of the freight of the goods ultimately saved as may have been paid *in advance under the stipulations of the charter-party: that the only freight which passes by abandonment to the insurer on the ship, is the freight of the goods on board at the time of the casualty and ultimately saved; but that the freight of goods landed previous to the casualty, under the terms of the charter-party, and thus earned before the loss, does not vest in the abandonnee of ship. (n)

The actual law in France, then, as far as relates to the effect of an abandonment of ship on freight, considered apart from the interests of the underwriters on freight, appears closely to resemble our own.

What deductions are to be made from the freight ultimately earned before its proceeds are paid over as salvage to the different sets of underwriters.

Sharp v. Gladstone, 7 East, 24.

§ 400. With regard to the deductions to be made from the freight ultimately earned, and which vests as salvage in the abandonnees, the following points have been decided: —

In a case in which ship and freight, on detention under the Russian embargo of 1800, had been severally abandoned to the respective underwriters, and where it was assumed

(j) See Emerigon, *ibid*.

(k) Art. 396.

(l) 23d August, 1823.

(m) 14th December, 1825.

(n) Blaize v. Paris General Ass. Comp. referred to by Boulay-Paty, Comment. on Emerigon, vol. ii. p. 260. ed. 1827, and cited at length by him in his Cours de

Droit Comm. Mar. tom. iv. pp. 397–417, ed. 1834. The whole case is very interesting, and well deserves perusal: its effect seems to have been misstated by Mr. Chancellor Kent, who refers to it in the last edition of his Comm. Vol. iii. p. 334, ed. 1844.

that each set of underwriters were to be considered as in the place of the assured for the respective interests insured, the shipowner claimed to make the following deductions from the freight ultimately earned before paying it over as salvage to the underwriters on freight, who had settled for and paid him a total loss : —

Constructive
total loss on
freight — effect
of abandon-
ment of ship on
freight.

1. Expenses of shipping the cargo on which the freight was paid, together with port charges and expenses of the ship and crew at St. Petersburg, and Elsinour (for payment of *Sound* duties.) 2. Insurance on same. 3. Wages and provisions of master and crew from the time they were liberated in Russia till discharged in Liverpool. 4. Their *wages* during their detention under the embargo (*provisions* were found by the Russian government.) 5. Charges paid at *Liverpool on ship and cargo. 6. Insurance on ship for the homeward voyage. 7. Diminution on ship's value thereon by wear and tear.

Deductions
claimed.

* 1156

With regard to these claims the court held, 1. That the expenses of shipping on board the homeward cargo, being altogether for the benefit of the *underwriters on freight*, should fall exclusively on *them* ; 2. That the expenses of ship and crew, and the insurance thereon, the wages and provisions of the master and crew between their liberation from the embargo and the ship's discharge, and their wages during the detention, should be deducted from the salvage, and apportioned between the two sets of underwriters according to their respective interests: the wages during the detention Lord Ellenborough intimated, might come into general average ; 3. The charges on ship and cargo in the port of discharge, the cost of insuring the ship for her homeward voyage, and the diminution of her value thereon by wear and tear, the court held must be struck out, as they could not be charged on the freight. (o)

Deductions
allowed.

In another case where the ship, having been cast away in the course of the voyage, a separate abandonment was made to both sets of underwriters ; but the abandonees on ship, in consideration of the assured's taking less than a total loss, renounced all claim to benefit of salvage, it was held, that the underwriters on freight, who had adjusted for and paid a total

Where ship is
repaired, and a
fresh cargo sent
on, the expen-
ses of shipping
such cargo are
deductions from
the freight due
to the under-
writers as sal-

(o) Sharp v. Gladstone, 7 East, 24.

Constructive
total loss on
freight — effect
of abandon-
ment of ship on
freight.

vage, but ex-
penses caused
by mere deten-
tion for repairs
are not.

Barclay v.
Stirling,
5 M. & Sel. 6.

loss, were entitled to the freight ultimately earned by the repaired ship's arriving with a substituted cargo, after deducting the necessary *expenses of loading such cargo on board at the port of repairs, and the wages of the crew during the loading* : any expenses, however, incurred while the ship was detained *merely for the purpose of necessary repairs* were not to be deducted from the freight, but set to the account of the shipowner, to be made good by the underwriter on ship. (p) ¹

(p) Barclay v. Stirling, 5 Maule & Sel. 6.

¹ If the owner of a ship and cargo abandon to the underwriters, as for a total loss by perils of the sea, and part of the goods be saved, the underwriters are liable for freight, *pro rata*, to the owner; for the owner has a lien on the goods for freight. *Teesdale v. Charleston Ins. Co.* 2 Brevard, 190.

*CHAP. IX.

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INCIDENTS AND EFFECTS OF ABANDONMENT.

SECT. I. *An Abandonment must be entire and absolute, not partial and conditional.*

§ 401. ONE of the first principles in this branch of insurance law is, that an abandonment must be entire, and not partial, by which is meant, that the assured, in case of loss, cannot abandon part and retain part, but the abandonment must extend to his whole interest in the thing insured, as far as that interest is covered by the policy.

Thus, where a single policy of insurance is effected on ship and cargo "*indiscriminately*," *i. e.* where a gross sum is insured, on the two interests jointly, without distinctly specifying how much is insured on each separately, it is stated by Emerigon that neither the ship nor the cargo can be separately abandoned. (a) ¹

But where it is specified in the policy that part of the whole valuation is to apply to the ship and part to the goods, and no goods have, in fact, ever been loaded on board, but the risk is run on the ship only, the ship alone may be abandoned; but the assured can only recover to the extent of the valuation on the ship. (b)

(a) Emerigon, chap. xvii. sect. 8, vol. ii. p. 250, ed. 1827. This position is laid down by Emerigon without any qualification, and seems, on principle, to be correct, though Mr. Phillips considers the point as doubtful, and cites some cases in the United States in which, upon such an insurance, a separate abandonment of one of the interests was, in fact, made and the courts appeared to take it for granted that such an abandonment was valid. Phillips on Ins. chap. xvii. sect. 7, vol. ii. p. 368. And see *Amery v. Rodgers*, 1 Esp. 208.

(b) *Amery v. Rodgers*, 1 Esp. 208.

An abandonment must be entire and absolute, not partial and conditional.

The abandonment must include the whole interest of the assured, as far as it is covered by the policy.

As where a policy is on "ship and cargo "*indiscriminately*," neither can be abandoned separately.

Aliter where the valuation is distinct on each.

So, where one sum is insured indiscriminately on a general class, as "goods," comprising several distinct kinds — neither of the kinds so comprised can be separately abandoned.

¹ See *Coolidge v. Gloucester Mar. Ins. Co.* 15 Mass. 341; *Hurtin v. Phoenix Ins. Co.* 1 Wash. C. C. 400.

An abandonment must be entire and absolute, not partial and conditional.

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Aliter where a distinct sum is insured on each distinct kind.

Semble, the law is the same where one gross sum is insured on several commodities, each separately valued.

Especially where the commodities are shipped in separate packages.

So, where a gross sum is insured in a single policy upon a general class comprising several particular subjects, without *specifying on which, or to what amount on each, — the insurance is one and entire (c), and the abandonment, consequently must extend to the whole class. Thus, if 1000*l.* be insured “on goods” generally, and the goods, in fact, consist partly of sugars and partly of indigoes, the assured cannot, in case of wreck, or other constructive total loss, abandon his sugars, and retain his indigoes, or *vice versa*. (d)¹

If, however, a specific and distinct sum be insured on each kind of commodities — as 1000*l.* on the sugars, and 1000*l.* on the indigoes, — in such case either of these two subjects may be separately abandoned. (e)

It has been said by a high authority in the law of Marine Insurance, that if the several kinds of commodities are each separately valued in the policy, they may each be separately abandoned, even though a specific and distinct sum may not be insured upon each. (f) Accordingly, in the United States, where one gross sum was insured “on 150 boxes of sugars, valued at 6000*l.*, 5 hampers of mace, valued at 5000*l.*, and 4 tons of logwood, valued at 250*l.* ;” it was held, that under such a policy the assured might abandon each article separately. (g)

This rule is doubted by Mr. Phillips, who contends that the insurance in such case is one and entire, though the valuation is distinct, and that, consequently, the abandonment ought to be entire also. (h) In this country, however, there seems no doubt that the rule, as laid down by Mr. Marshall, is that to be acted upon, especially in cases where perishable commodities are shipped in separate packages; when, as we have seen, the insurance is, in practice, taken to be distinct on each species, even without a special clause to that effect. (i) Chancellor Kent, after noticing the doubt

(c) *Est unica asecuratio omnium mercium*. Emerigon, chap. xvii. sect. 8, vol. ii. p. 249, ed. 1827.

(d) Emerigon, chap. xvii. sect. 8, vol. ii. p. 249, ed. 1827.

(e) *Ibid*.

(f) Marshall on Ins. 612.

(g) † Diedericks v. Commercial Ins. Comp. of New York, 10 John. Rep. 234.

(h) 2 Phillips on Ins. 370.

(i) See Stevens on Average, 237, 5th ed.

raised by Mr. Phillips, thus cautiously lays down the rule : —
 * “ Unless the different sorts of cargo be so distinctly separated and considered in the policy, as to make it analogous to distinct insurances on distinct parcels, there cannot be a separate abandonment of part of the cargo insured.” (j)

An abandonment must be entire and absolute, not partial and conditional.

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Where, however, the assured effects *two separate policies* upon constituent parts of the same cargo, it is hardly necessary to say, that in such case he may abandon either part separately, though both policies are effected with the same set of underwriters. (k)

Where two separate policies are effected on two distinct portions of one cargo, either may be abandoned without the other.

Although, however, it is true, as a general rule, that wherever the insurance is entire the abandonment must be so too, and therefore extend to the whole subject of the policy ; yet the rule must be understood with this limitation, *that the abandonment cannot transfer the interest of the assured any further than that interest is covered by the policy.*

The abandonment can only operate on the subject insured up to the extent of the insurance.

Thus, if A.'s cargo is worth 30,000*l.*, and he only insures it to the amount of 15,000*l.*, it is plain that only half his interest in this cargo is covered by the policy : in case of loss, therefore, followed by abandonment, all that A. by his abandonment transfers to the underwriter is a moiety of the cargo ultimately saved ; the other moiety he retains for himself in respect of that portion of his interest which was not covered by the policy. (l) In fact, as Boulay-Paty observes, this is an entire abandonment, for it comprises the *whole of the interest at risk* : the part kept back is only in proportion to that which was not insured, and in respect of which, therefore, the underwriters can have no claim. (m)

The rule is the same, where a general insurance having been effected “ on cargo ” to a certain amount, the value of the interest at risk becomes greatly increased by fresh goods being taken on board in exchange for the original cargo ; as in the course of a bartering voyage : in such case, if a loss occurs which gives a right to abandon, when the cargo at risk is double the original value, that which will be thereby *transferred to the underwriter as salvage, is not the whole of the cargo at risk at the time of the loss, but only half thereof,

The same rule applies to any increase in the value or quantity of the cargo accruing in the course of the voyage, over and above the value insured.

* 1160

(j) Comm. vol. iii. (5th ed.) 329.

(l) Boulay-Paty, Cours de Droit Comm.

(k) Emerigon, chap. xvii. sect. 13, vol. ii. p. 271, ed. 1827.

Mar. tom. iv. p. 286, ed. 1834.

(m) Ibid.

An abandonment must be entire and absolute, not partial and conditional.

Though the underwriters demand an abandonment of more than is covered by the policy, the assured may abandon to that amount, and recover for a total loss.

Abandonment only extends to property at risk at the time of the loss, and therefore not to goods previously landed.

or the value at risk at the time of the insurance, and covered by the policy. (n)

So clearly is the general rule established, that if the underwriters demand an abandonment of more than is insured, this will not prevent the assured from abandoning up to the extent of the sum insured, and, having done so, recovering as for a total loss; though, if abandonment be otherwise requisite, such demand of the underwriters will not operate as a waiver of their right to insist on notice of abandonment, or entitle the assured to recover, without it, a total loss, to which he would otherwise have had no claim. (o)

It must also be remembered, that an abandonment *only relates to the property actually at risk at the time of the disaster*: if, therefore, in the course of the voyage, a part of the goods originally insured have been landed and sold before the occurrence of the casualty, the abandonment does not relate to them, but only to the goods on board at the time of the loss. (p) In such case, the assured, on the one hand, can make no claim against the underwriters in respect of the goods so landed, and, on the other hand, is only bound to abandon the goods which were actually at risk when the loss occurred. (q)

Every abandonment must be absolute and unconditional.

§ 402. An abandonment must operate not only as a transfer of the whole interest of the assured in the subject of the insurance, but it must be such as to effect that transfer absolutely and unconditionally. "Every abandonment," says Valin, "must be pure and simple, and not conditional, otherwise it would not act as a *transfer of ownership, which is of the very essence of abandonment*." (r)¹

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*Hence it follows, that no one can be entitled to make an

(*) Pothier, *Traité d'Assurance*, No. 133, ed. by M. Estrangin, of 1810, p. 199.

(o) *Havelock v. Rockwood*, 8 T. Rep. 268.

(p) Emerigon, chap. xvii. sect. 8, vol. ii. p. 250, ed. 1827.

(q) Boulay-Paty, *Cours de Droit Comm.* Mar. tom. iv. p. 269, ed. 1834.

(r) Valin, tit. vi. des *Assurances*, art. 60, vol. ii. p. 418, ed. de M. Becane, 1828.

See also Emerigon, chap. xvii. sect. 6, vol. ii. p. 231, ed. 1827.

¹ The abandonment must be positive and absolute, not fettered by contingencies, conditions, or limitations. Per Shaw, Ch. J., in *Pierce v. Ocean Ins. Co.* 18 Pick. 93. See *Fuller v. M'Call*, 1 Yeates, 464; *S. C.* 2 Dallas, 219; *Patapaco Ins. Co. v. Southgate*, 5 Peters, (S. C.) 622.

abandonment who has not at the time of the loss an absolute right of ownership in the subject insured.

Thus it has been decided in the United States, that where the assured has abandoned all his interest in the subject of insurance to one set of underwriters, he cannot afterwards make an abandonment to other underwriters of the same subject. (s) So, again, it has been there held, that, if the assured, by mortgaging his ship, has voluntarily deprived himself of the power of conveying an absolute title, he cannot abandon to the underwriters on ship, but can recover only for the damage he has actually sustained, as a partial loss. (t)

Whether the consignee of a bill of lading has a right to make abandonment of the goods, must depend on the question, whether the possession of the bill of lading gives him a right to have the absolute and unconditional possession of the goods. In several cases, indeed, tried before Lord Ellenborough, which arose on the American embargo of 1807, and in which it appears that the consignees in England of the bills of lading had abandoned goods detained by that embargo, Lord Ellenborough thought it might be difficult to make out that they had such an interest as would entitle them to abandon, because they were to have no control over the goods till their arrival: his lordship, however, gave no decision on the express point, and the cases were decided against the right of the consignees on other grounds. (u)

An abandonment must be entire and absolute, not partial and conditional.

He who abandons, therefore, must have the absolute ownership at the time of the loss.

He who has abandoned his whole interest to one set of underwriters cannot afterwards abandon it to others.

Mortgagor of ship cannot make a valid abandonment.

Query, whether the consignee of bill of lading has a right to abandon.

SECT. II. *Form of Notice of Abandonment.*

§ 403. No precise form is required for a notice of abandonment; ¹ nay, it is not even necessary that it should be in writing (v), ² though, in point of fact, it generally is so.

Form of notice of abandonment.

Notice of abandonment need be in no precise form, but must be direct, plain, and unequivocal.

(s) † *Higginson v. Dall*, 13 Mass. Rep. 96. 2 Phillips, Ins. 247.

(t) † *Gordon v. Massachusetts Fire and Marine Ins. Comp.* 2 Pick. 249. † See *Rice v. Homer*, 12 Mass. 230. }

(u) *Conway v. Gray*, 10 East, 536, and the two other cases there cited.

(v) *Parmeter v. Todhunter*, 1 Camp. 542. See also *Read v. Bonham*, 3 Brod. & Bingh. 147. *Lord Ellenborough con-*

¹ *Snydam v. Marine Ins. Co.* 1 John. 190; *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383. *Shaw, Ch. J.*, in *Peirce v. Ocean Ins. Co.* 18 Pick. 63, 93.

² See *Peirce v. Ocean Ins. Co.* 18 Pick. 63, 93; *Duncan v. Coates*, 3 Yeates, 378; *Duncan v. Koch, Wallace*, 33; *Palapaco Ins. Co. v. Southgate*, 5 Peters, 604.

Form of notice
of abandon-
ment.

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Parmeter v.
Todhunter,
1 Camp. 542.

Thellusson v.
Fletcher,
1 Esp. 72.

Claim for total
loss followed by
payment is evi-
dence of notice
of abandon-
ment.

*Whether given orally or in writing, it is an indispensable requisite, that it shall communicate *unequivocally*, and in plain terms, that the assured offers to abandon to the underwriters all his interest in the thing insured. "The abandonment," says Lord Ellenborough, "must be direct and express, and I think the word *abandon* should be used to make it effectual." (w) ¹

Hence, where the broker communicated to the underwriters that the voyage had been broken up by the capture of the ship and cargo, and requested them to settle as for a total loss, and to give directions as to the disposal of the ship and cargo—Lord Ellenborough held this not to be sufficient as a notice of abandonment. (x) Lord Kenyon had previously come to the same conclusion, in a case where the broker showed the underwriters a letter from the assured, stating that the ship had been forced ashore, and a quantity of sugars damaged, upon which the underwriters desired that the assured would do the best he could for the damaged property. (y)

But though a demand for a total loss, in itself, does not in this country operate by implication as a notice of abandonment, yet such a demand, *followed by payment as for a total loss*, is evidence that an offer of abandonment has been made and accepted. (z) ²

sidered that it would have been well to prevent oral notices of abandonment entirely, but admitted that in practice they were held to be operative.

(w) Parmeter v. Todhunter, 1 Camp. 542.

(x) Ibid.

(y) Thellusson v. Fletcher, 1 Esp. 72.

(z) Houstman v. Thornton, Holt's N. P. 242.

¹ The abandonment must, in substance, be positive and absolute, and import an actual present relinquishment, and must truly state the reasons or grounds of abandonment. Per Shaw, Ch. J., in Peirce v. Ocean Ins. Co. 18 Pick. 83; Suydam v. Marine Ins. Co. 1 John. 181; Bell v. Beveridge, 4 Dallas, 272; Patapsco. Ins. Co. v. Southgate, 5 Peters, (U. S.) 604.

² In Peirce v. Ocean Ins. Co. 18 Pick. 83, Mr. Chief Justice Shaw said;—"A question has been made, whether a claim for a total loss does not necessarily imply an abandonment. It is difficult to answer a question thus nakedly put. Upon principle, it would seem that a mere claim for a total loss does not necessarily imply an abandonment, because, in some cases, a total loss may be recovered without an abandonment. But, commonly, a claim for a total loss will be accompanied by a statement of facts and circumstances, by the reasons and grounds of claim upon which the assured proceeds, and such statements of the grounds of claim may, perhaps, carry as plain an implication of actual abandonment as could be done by express words."

In the United States the Courts have been less rigorous; and the rule there established is, that where the nature of the transaction is such as to leave no reasonable doubt of the intention of the assured to abandon, and of that intention being understood by the underwriters, it shall be implied that a proper offer of abandonment has been made, though no formal notice can be proved to have been given. (a)

*The notice of abandonment ought to contain, or be accompanied with, a short statement of the grounds of abandonment, in order that the underwriters may determine whether to accept it or not;¹ and in the United States it has been held (but not in this country,) that the assured cannot avail

Form of notice of abandonment.

Presumptive proof of notice in the United States.

*1163

The grounds of abandonment should be sent with the notice.

(a) Thus, in the Supreme Court of the United States, a letter to the underwriters, containing a statement of the loss and subsequent sale of part of the property, and also a claim for the balance of the amount insured, less the salvage, was held to be a sufficient notice of abandonment. († *Pataasco Ins. Comp. v. Southgate*, 5 Peters, (S. C.) Rep. 604.) So payments made upon a claim for a total loss have been held there to waive all defects and form of notice. († *Watson v. Ins. Comp. of North America*, 1 Binney, 47.) So the underwriters calling for papers to prove a total loss after claim made. († *Galbraith v. Gracie*, 1 Wash. C. C. 219. See the cases collected in 2 Phillips on Ins. 394-397. < *M'Intire v. Bowne*, 1 John. 229. *M'Lellan v. Maine F. & M. Ins. Co.* 12 Mass. 246. >

See *Watson v. Ins. Co. of N. America*, 1 Binney, 47; *Galbraith v. Gracie*, 1 Wash. C. C. 219. It has, however, been expressly held in Louisiana, that a demand for a total loss is an abandonment. *Cassidy v. Louisiana State Ins. Co.* 6 Martin, 421. See also *Pataasco Ins. Co. v. Southgate*, 5 Peters, (U. S.) 604.

¹ To render an abandonment effectual, it is held that the cause of the loss of the ship must be stated in the letter of abandonment, for the benefit of the insurer. *Hazard v. N. Eng. Marine Ins. Co.* 1 Sumner, 218. Where a steamboat was insured by a river policy, and a loss occurred by the bursting of the boiler, the letter of abandonment stated, as the cause of loss, that the boat "had been nearly destroyed by the late disaster." The cause of the loss being a matter of public notoriety, and the insurance company having proceeded to act on the abandonment, this was held to be sufficient. *Citizens Ins. Co. v. Glasgow*, 9 Missouri, 411. The following abandonment was held sufficient. "The brig *Gem* being ashore, and not probable that she will be got off, I hereby abandon said vessel to the office, and claim a total loss, as insured by policy No. 16,677." *Reynolds v. Ocean Ins. Co.* 22 Pick. 191. There was, however, in the above case, evidence tending to show, that the notice of abandonment was accompanied by certain letters, which were, at the same time, exhibited to the insurers. 22 Pick. 194. Where the assured, in making an abandonment in consequence of information contained in a letter, communicates so much of the letter as he deems material, expressly designating it as an extract, and the underwriters do not call for the whole of the letter, the omission to communicate the whole will not affect the validity of the abandonment. *Loving v. Mercantile Mar. Ins. Co.* 12 Pick. 348. See *Barker v. Phoenix Ins. Co.* 8 John. 307.

Form of notice
of abandon-
ment.

No deed of ces-
sion requisite to
complete the
abandonment.

himself of any other grounds of abandonment than those so stated. (b)¹

Supposing a notice of abandonment to have been duly given, no deed of cession, or formal transfer of any kind, is necessary to enable the assured to perfect his abandonment, and recover as for a total loss.² A valid notice of abandonment operates, in fact, as an offer of abandonment *at the time it is made*, and also as a complete transfer of property, supposing either; 1. It is accepted, or 2. Supposing the loss in respect of which it was made to continue total down to the time of action brought.³

(b) See *†Suydam v. Marine Ins. Comp.* in error, 2 Johnson, 136, and the other cases collected in 2 Phillips on Ins. 396. It appears, however, exceedingly doubtful whether this would be so held in England: with us the great criterion of the right to recover as for a total loss is the state of the property at the time of action brought: supposing it *then* to be in such a state as to give a right to abandon, the

assured might recover for a total loss, although the original ground of abandonment had then ceased to exist. If, however, the rule as above laid down in the United States only means that the grounds stated in the notice of abandonment must at *some time* really have existed, and that unless they have done so, the notice is invalid; the law *here*, would, it is conceived, be exactly the same as it is there.

¹ In *Peirce v. Ocean Ins. Co.* 18 Pick. 93, 94, Mr. Chief Justice Shaw said; — "The underwriters ought to be informed by the assured, who alone know the fact, of the nature of the constructive total loss, upon which the claim is made, that they may judge whether they will accept the abandonment, and that they may forthwith take the necessary measures which such an acceptance would render necessary and proper. *And the assured cannot avail himself of any other ground, than that stated by him at the time of abandoning.* If the ground stated is insufficient, the underwriters will be justified in refusing to accept the abandonment, and if there be another ground sufficient in fact, but no notice of it communicated to the underwriters, it is ineffectual to found a claim for a total loss, as if no abandonment at all had been made. *Suydam v. Marine Ins. Co.* 1 John. 181." See *Hazard v. N. Eng. Marine Ins. Co.* 1 Sumner, 218; *Dickey v. N. York Ins. Co.* 4 Cowen, 222; *King v. Delaware Ins. Co.* 2 Wash. C. C. 300; *Dorr v. N. Eng. Marine Ins. Co.* 4 Mass. 230; *Ralston v. Union Ins. Co.* 4 Binney, 400, 403; *Bosely v. Chesapeake Ins. Co.* 3 Gill & John. 450. If a sufficient cause for abandonment is stated, when the offer to abandon is made, other additional causes need not be communicated, although they were known to the assured, if the underwriters refuse to accept the abandonment. *Dedrer v. Delaware Ins. Co.* 2 Wash. C. C. 61.

² See *Ches. Ins. Co. v. Stark*, 6 Cranch, 272; *Hurtin v. Phoenix Ins. Co.* 1 Wash. C. C. 400.

³ See *Columbian Ins. Co. v. Catlett*, 12 Wheaton, 383; *Lovering v. Mercantile Mar. Ins. Co.* 12 Pick. 348.

TIME FOR GIVING NOTICE OF ABANDONMENT.

SECT. III. *Time within which Notice of Abandonment must be given.*

§ 404. As the effect of a valid notice of abandonment (unless counteracted by the subsequent recovery of the property before action brought) is, to make the underwriters owners *of the abandoned property (or salvage) ; and as the ultimate value of such property may be considerably affected by the promptitude with which measures are taken to effect either its sale or recovery, it is obviously just that the assured, if he means to abandon, and thereby throw upon the underwriters the ownership of the thing insured, should give them notice of his intention to do so within a reasonable time after receiving intelligence of the loss, in order that they may take immediate steps for turning the property thus cast upon their hands to the best account. (c) ¹

Immediately, therefore, the assured has determined to abandon, he must give notice of abandonment to his underwriters : of this there is no doubt : the great practical difficulty has been, to lay down any rule as to the time which the assured shall be allowed, after receiving intelligence of the loss, for making up his own mind whether he will abandon or not.

The cases cited in the present section, in fact, show that there is no fixed rule in this country on this subject, but that what shall be considered reasonable time for this purpose must depend, in some degree, upon the *certainty of the news of the disaster*, and upon the *nature of the casualty itself*.²

(c) Per Lord Abinger in *Roux v. Salvador*, 3 Bingh. N. C. 281.

Time within which notice of abandonment must be given.

Reasons why notice of abandonment should be promptly given.

* 1164

The question is, how long, after receiving intelligence of the loss, is the assured bound to give notice of abandonment.

There is no fixed rule.

¹ 3 Kent, (5th ed.) 320, 321 ; *Hurtin v. Phoenix Ins. Co.* 1 Wash. C. C. 400 ; *Livermore v. Newburyport Ins. Co.* 1 Mass. 264.

² The question, whether an abandonment is made in a reasonable time, is a mixed question of law and facts, and where the facts are not agreed, it should be submitted to the jury. *Reynolds v. Ocean Ins. Co.* 22 Pick. 191 ; *Smith v. Newburyport Ins. Co.* 4 Mass. 668, 670 ; *Peele v. Suffolk Ins. Co.* 7 Pick. 254, 258 ; *Parker v. Towers*, 2 Browne, App. 80 ; *Bell v. Beveridge*, 4 Dallas, 272 ; *Livingston v. Maryland Ins. Co.* 7 Cranch, 306 ; *Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268 ; *Maryland Ins. Co. v. Ruden*, 6 Cranch, 338. If, where a vessel is stranded, but not bilged, the assured, upon the first information of the loss, is in a state of uncertainty as to the actual condition of the vessel, and waits a few days for more definite information, and not with

Time within which notice of abandonment must be given.

If the intelligence is certain, and the disaster clearly such as gives the right to abandon, the assured ought to give notice immediately. If the intelligence, or the nature of the disaster, be more doubtful, the assured has more time for giving notice.

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It is only in order to verify the intelligence or ascertain the real nature of the loss, that any delay can be allowed.

If the intelligence is *certain*, and the disaster one, such as capture, arrest, or detention, which is manifestly, *prima facie*, a constructive total loss as long as it continues, though the time it may continue is uncertain, the assured ought to give notice of abandonment *immediately* upon receipt of the intelligence.

If, on the other hand, the information received is doubtful, or the casualty of such a description that it does not necessarily, and *per se*, give a right to abandon, — as in the case of the stranding or partial wreck of the ship, or the damage done by sea-water to perishable goods, — the assured, in such cases, may wait a reasonable time, before giving notice of abandonment, in order that he may have the opportunity of receiving more accurate information as to the nature of the *loss, or ascertaining with more precision the actual extent of the damage.

It is only, however, for these two purposes that any delay at all can be allowed him: he cannot be permitted to defer giving notice of abandonment from any *considerations as to the state of the markets*; ¹ for any profit which may ultimately be made in this way ought, in justice, to belong to the underwriters: neither can he lie by and treat the loss as an average loss, until the recovery of the property becomes hopeless, and then give notice of abandonment; ² for the underwriters are of right entitled to all those chances of recovery, which might arise from the speediest and most immediate endeavors for that purpose; in fact, in the words of Lord Kenyon, he must “make his election speedily whether he will abandon or not, and so put the underwriters in a situation to do all that is

a view to speculate on chances, and if the length of time she has remained ashore has increased the probability that she cannot be got off, and the loss continues total at the time of the abandonment, these are circumstances tending to show that the abandonment is made within a reasonable time. *Reynolds v. Ocean Ins. Co.* 22 Pick. 191. The right to abandon may be kept in suspense by mutual agreement between the parties. *Livingston v. Mar. Ins. Co.* 6 Cranch, 274.

¹ See *Smith v. Buchanan*, 3 Wash. C. C. 127; *Livermore v. Newburyport Ins. Co.* 1 Mass. 291; *Savage v. Pleasants*, 5 Binney, 403.

² The assured has no right to wait, in order to find out the extent of a loss on a sale of property insured, and deteriorated by perils insured against, before abandonment. The right to abandon cannot depend upon events which take place after the peril is over. *Teasdale v. Charleston Ins. Co.* 2 Brevard, 190.

necessary for the preservation of the property, whether sold or unsold. (d)

Of course, if the assured is *not proved to have had intelligence of the loss* until nothing is left to abandon, no defence founded on his not having given notice of abandonment at all, or in due time, can be a bar to his claim for a total loss. (e)

First, then : *where the intelligence is certain, and the disaster one which manifestly gives a prima facie right of abandonment, the assured ought to give notice of abandonment immediately upon the receipt of the intelligence.*

Thus, where, in the case of an insurance on perishable goods, "*free of average*," the ship was compelled to put back in distress, and, after two surveys, was condemned as irreparable : Lord Ellenborough held, that a notice of abandonment not given to the underwriters till *five days after the assured knew of the condemnation* of the ship, was too late : his lordship was even strongly of opinion, that, immediately on being apprized of the ship's having put in in distress, the assured, acting on the information they then had at hand, should have addressed themselves promptly to the underwriters, without relying by for the result of a final survey, but that, at all events, *five days* after knowing such result was too late (f) : it is observable, that in this case the insurance was on perishable goods *warranted free of average* ; and Lord Ellenborough laid some stress on this fact, on the ground that, as, by the terms of the policy, the assured were excluded from indemnity for particular average loss, they ought to have made use of the earliest opportunity to take themselves out of the exception.

Where, in an insurance on *ship*, a delay of *sixteen or seventeen* days elapsed after the result of a final survey was known, before notice was given, such notice was held too late. (g)¹

Time within which notice of abandonment must be given.

The assured must have had intelligence of the loss.

Where the intelligence is certain, and the disaster one which gives a clear *prima facie* right of abandonment, the assured must give notice immediately he receives the intelligence.

Notice *five days* after ship condemned as irreparable, held too late. *Hunt v. Royal Exch. Ass. Comp.* 5 M. & Sel. 47.

* 1166

So notice sixteen days after result of final survey known. *Aldridge v. Bell, 1 Stark.* 498.

(d) In *Allwood v. Henckle*, Park, 400, 8th ed.

(e) *Abel v. Potts*, 3 Esp, 242.

(f) *Hunt v. Royal Exch. Ass. Comp.* 5 Maule & Sel. 47.

(g) *Aldridge v. Bell*, 1 Stark. 498.

¹ See *Orrok v. Commonwealth Ins. Co.* 21 Pick. 458, 464. In this case, a vessel being injured in a foreign port, a survey was called, and the surveyors recommended a sale. The master having sold the vessel, returned home, where he arrived on the

Time within which notice of abandonment must be given.

It must be shown that assured had full means of being informed of the real facts of the loss.

Read v. Bonham, 3 Brod. & Bingh. 147.

Notice *three* days after first proved receipt of full information, held sufficient in case of sale of ship abroad.

Assured is bound to give notice of abandonment *immediately* on hearing of ship's capture or detention.

In order, however, to make it appear that there has been a laches on the part of the assured, it must be shown that he had full means of being informed of the real state of the loss at the time when it is contended that he ought to have given notice of abandonment. Hence, where the owner of an East India ship, which had been sold as irreparable at Calcutta, gave notice of abandonment *three days* after he had received the first accurate information of the loss, that was held sufficient, although it appeared that the captain of the ship had arrived in London, where the owner resided, ten days previously, and probably might, but was not proved to, have communicated to the owner, on his arrival, the facts of the loss. (*h*)

Lord Ellenborough held,¹ in two successive cases, that where the ground of abandonment was the *ship's seizure and detention*, the assured was bound to give notice immediately on *first receiving intelligence of the seizure and detention*, without lying by for its final condemnation. (*i*)¹

(A) *Read v. Bonham*, 3 Brod. & Bingh. 147.

(i) *Mullett v. Shedden*, 13 East, 304.
Mellish v. Andrews, 15 East, 13.

10th of July, 1835. The abandonment was made on the fifth of the next month, and it was held to be too late.

¹ Under a policy of insurance, containing a clause, that "in case of capture or detention the assured shall not have the right to abandon therefor, until proof is exhibited of condemnation, or of the continuance of the detention for at least ninety days," although the detention may, in reality, have continued for that period, yet the assured cannot abandon therefor, until he has intelligence and proof that such detention has continued for the term of ninety days. *Lovering v. Mercantile Mar. Ins. Co.* 12 Pick. 348, 359. See *Columbian Ins. Co. v. Catlett*, 12 Wheaton, 383. The kind or degree of proof necessary to be furnished, on the offer to abandon, of the continuance of the detention, is not that which would be required to sustain an action on the policy, but such as is usually produced to underwriters as preliminary proof of loss; as the protest of the master, a letter from an officer or agent having charge of the vessel, or any such evidence as will satisfy the clause in the policy, requiring notice and proof of loss sixty days before the commencement of an action. *Lovering v. Mercantile Mar. Ins. Co.* 12 Pick. 348, 359, 360; *Reynolds v. Ocean Ins. Co.* 22 Pick. 191. But a premature offer to abandon for such detention may, in consequence of the acts of the parties, operate as a continuing notice of abandonment, which will become effectual so soon as the assured shall receive and communicate to the underwriters evidence of the detention having continued ninety days. Thus, where the offer never was countermanded, but the assured, as well in furnishing the requisite proof of the continuance of the detention, as in other transactions with the underwriters, acted upon it from time to time, with their knowledge, as a subsisting notice, it was held to have become a valid abandonment. *Lovering v. Mercantile Mar. Ins. Co.* 12 Pick. 348; *Columbian Ins. Co. v. Catlett*, 12 Wheaton, 383. The abandonment under the above or a similar

Thus, where a ship and cargo were *seized* in a foreign port on the 7th of December, 1810, and the assured first heard of the seizure on the 8th of January, 1811, but did not give *notice of abandonment *till nine days after* — Lord Ellenborough held, that, had this been a case in which notice of abandonment was necessary, the notice given would have been clearly too late, although the cargo, in which alone the assured was interested, was not finally condemned until the 30th of April. (j)

Time within which notice of abandonment must be given.

Nine days after hearing of seizure held too late. *Mellish v. Andrews*, 15 East, 13.

* 1167

From these cases, then, it appears that in this country the assured is bound to give notice of abandonment *immediately on first receiving certain intelligence of capture, detention, and disability, without waiting to see the further issue of the casualty*: in the United States the rule is different; and, provided the peril still subsists and is operating on the property, the assured may wait for new circumstances, which are the direct consequences of the peril: for instance, in cases of capture or arrest, he may lie by and not abandon till he receives intelligence of condemnation:¹ in case of

In the United States, provided the peril still subsists, and is operating on the property, the assured may wait for new circumstances, which are the direct consequences of the peril, before he gives notice.

(j) *Mellish v. Andrews*, 15 East, 13.

clause, being duly made, relates back to the time of the capture. *Lovering v. Mercantile Mar. Ins. Co.* 12 Pick. 348; *Clarkson v. Phoenix Ins. Co.* 9 John. 1. The above provision means, not merely that the assured shall not abandon within the ninety days, or other specified time, but that he shall have the right to abandon only for a restraint or capture that continues during such time; *Dorr v. Un. Ins. Co.* 8 Mass. 502; unless the property is sooner condemned. *Ogden v. Col. Ins. Co.* 10 John. 273. See *Law v. Goddard*, 12 Mass. 112, 114.

¹ See *Maryland & Phoenix Ins. Co. v. Bathurst*, 5 Gill & John. 159; *Dorr v. Un. Ins. Co.* 8 Mass. 494; *Dorr v. New England Ins. Co.* 11 Mass. 1; *Earl v. Shaw*, 1 John. Cas. 313; *Bohlen v. Del. Ins. Co.* 4 Binney, 430; *May v. Tuono*, 2 Bay, 307. Mr. Justice Radcliff, giving the opinion of the court in a case of capture, said; — "If the loss continues total, the assured may at any time abandon." *Roget v. Thurston*, 2 John. Cas. 248. And Mr. Justice Livingston, in a case of detention, where the assured did not abandon until fifteen months after the vessel was seized, said; — "It has been decided by this court, *Earl v. Shaw*, 1 John. Cas. 313, that an abandonment may be made at any time after the accident, provided the loss continues total at the date of the abandonment." *Steinback v. Col. Ins. Co.* 2 Caines, 132. And Mr. Justice Kent said, in another case, "the time of abandonment is not material, since the loss remained total when the abandonment was made." *Lawrence v. Sebor*, 2 Caines, 207. See also *Bohlen v. Delaware Ins. Co.* 4 Binney, 430; *Brown v. Phoenix Ins. Co.* 4 Binney, 430. These observations must, however, be taken subject to the rule, that, where an abandonment is necessary, as a foundation for a claim for a total loss, it must be made within a reasonable time. See 3 Kent, (5th ed.) 321; *Gracie v. New York Ins. Co.* 8 John. 253; *Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268; *Bell v. Beveridge*, 4 Dallas, 272; *Savage v. Pleasants*, 5 Binney, 403; *Galbraith*

Time within which notice of abandonment must be given.

The rule is different in this country.

Case of Kelly v. Watson considered.

A plaintiff who had given no notice of abandonment on first hearing of an embargo, afterwards gave notice on finding that it had continued so long as to defeat his adventure: held too late, not being given till a month after it became certain that the adventure was defeated. Query, whether it would have been in time if given immediately that event became certain?

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disability by stranding he need not abandon till the ship is sold. (k) ¹ The American courts, indeed, *profess* to deviate in this respect from the doctrine that prevails in England and most other maritime countries. (l) Mr. Phillips, however, endeavors to show that there is no real difference between the law on this and the other side the Atlantic (m): but, with all possible deference to this copiously learned and generally accurate writer, it appears to me that the tenor of the English authorities does not warrant this position.

The cases already cited, though not direct decisions *in rem*, are, inferentially, strong authorities to the contrary; and the only English decision which seems, even *prima facie*, to support the American doctrine is a Nisi Prius ruling of Lord Ellenborough, in a case, of which the facts were as follows:—A cargo of flax seed, which the plaintiffs had insured on a voyage “from Philadelphia to Limerick,” was detained at Philadelphia by an American embargo on the 23d December, A. D. 1807. The plaintiffs were informed of this fact at Limerick on the 11th February, 1808: they, however, took no immediate steps in consequence, but on the 11th of June, finding that the embargo still continued, and that the seed would then be useless for their purposes,

(k) See the cases collected in 2 Phillips on Ins. 387.

(l) See the observations of Mr. J. Liv-

ington in the case of *† Tom v. Smith*, 3 Caines, 245, cited 2 Phillips, 387.

(m) 2 Phillips, 388.

v. Gracie, 1 Wash. C. C. 219; *Livermore v. Newburyport Ins. Co.* 1 Mass. 264; *Roget v. Thurston*, 3 John. Cas. 248. The assured has, in different cases, been held to lose the right of abandonment by a delay of *forty-five days*, *Smith v. Newburyport Mar. Ins. Co.* 4 Mass. 668; by a delay of *thirty-eight days*, *Barker v. Blakes*, 9 East, 583; by a delay of *thirty days*, *Savage v. Pleasants*, 5 Binney, 403; by a delay of *nine days*, *Mellish v. Andrews*, 15 East, 13; by a delay of *five days* after intelligence, *Hunt v. Royal Exch. Ass. Co.* 6 M. & S. 47; where no reason could be given for the delay. But a delay of *five months*, was, in one case, held not to be a forfeiture of this right, it appearing that, during a very considerable part of that time, business was suspended, in consequence of an epidemic, in Philadelphia, where the insurance was made. *Bell v. Beveridge*, 4 Dallas, 272. See *M'Calmont v. Murgatroyd*, 3 Yeates, 27. A delay of *ten days*, by the agents of the assured, while the *despatcheur* translated and prepared the documents to lay them before the underwriters, was not considered to be a forfeiture of the right to abandon. *Duncan v. Koch*, Wallace, 33. The assured is not excused for delaying to abandon on the ground that the underwriters are not thereby prejudiced. *Mellon v. Louisiana State Ins. Co.* 5 Martin, (N. S.) 563.

¹ But see *Teasdale v. Charleston Ins. Co.* 2 Brevard, 190.

even if it arrived, owing to an Irish statute, prohibiting any flax seed of the preceding year's growth being sown after the 10th of May, they gave notice of abandonment: in order to excuse this delay, they contended, at the trial, that the embargo alone, while its duration was uncertain, did not, in the first instance, constitute a ground of abandonment: but that the real and only ground arose when it first became certain that the flax seed could not arrive in time.

Time within which notice of abandonment must be given.

Lord Ellenborough said, as to the first point, "*a complete ground of abandonment certainly existed on the 11th of February, when the plaintiffs heard of the ship being detained; but they did not then abandon, and their right of doing so, arising from the embargo merely, was gone:*" as to the second point, his lordship thus expressed himself: "it is said, however, that a new state of things arose at the expiration of the season for sowing flax seed in Ireland. *Supposing a right of abandonment thus to have revived, I am afraid it has not been exercised with sufficient promptitude. The sowing season ended on the 10th of May, the abandonment was not made till the 11th of June, and, according to several decided cases, that was out of time.*" (n)

Can a right of abandonment revive?

Even supposing this case to be a binding authority, it amounts to very little. Lord Ellenborough only speaks doubtfully as to the assumed revival of the right of abandonment, and decides the case on another ground. At all events, it would be unsafe to found upon a single *Nisi Prius* decision any general rule, in the face of two more recent decisions in banc, on which the very point was fully presented to the mind of the same judge, and by him decided in a different way.

Remarks on this case.

§ 405. *If, however, the information itself is uncertain, or the nature of the casualty such, that the assured cannot be expected to *make up his mind as to the expediency of abandonment, without an opportunity of first ascertaining the nature and extent of the damage, reasonable time ought to be allowed him for that purpose; and a notice of abandonment will not be held too late*

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If the information itself is uncertain, or the nature of the casualty indecisive, reasonable time should be allowed for ascertaining the nature and extent of the damage.

(n) Kelly v. Walton, 2 Camp. 155.

Time within which notice of abandonment must be given.

Where a perishable cargo comes into port sea-damaged to an extent that cannot be at once ascertained, assured may wait for the result of a final survey.
Gernon v. Royal Exch. Ass. Comp., 6 Taunt. 381.; 2 Marsh. Rep. 88.

*which is not delayed longer than may be necessary for enabling such an investigation to be made.*¹

Thus, where some time was necessarily spent, after the ship's arrival, in ascertaining the state of a damaged cargo, the notice of abandonment was not held to be too late because postponed till after such survey was completed. The facts were these: — The plaintiff had insured sugar (*not warranted free of average*) from Liverpool to Calais. The ship sailed on the 1st of December, but was compelled, from stress of weather, to put back to Liverpool on the 20th. On that day the agents in Liverpool wrote to the assured in London, simply stating that the ship had put back in distress, and that the cargo was to be examined the next day. On the 21st December the first survey took place. On the 24th the agents wrote a second letter, stating that the damage was not so great as had been supposed, *and that they intended sending the cargo on*. On the 29th December they wrote again, to say that a great many boxes were damaged, *but that they meant to send the rest on*: lastly, on the 7th of January, they wrote to communicate the result of the final survey, by which it appeared that the goods were all more or less damaged, and that it would be advisable to sell them where they lay on account of the underwriters. The plaintiffs in London received this letter on the 9th of January, and immediately handed it over, with a notice of abandonment, to the underwriters, who desired the plaintiffs to act as though they were not insured.

At the trial, Chief J. Gibbs told the jury that they were to consider whether the time which the plaintiffs had taken in making their abandonment *was longer than was sufficient for ascertaining and judging of the state of the cargo*. The jury found it was not, and the plaintiffs had a verdict; which, *on application for a new trial, the Court of Common Pleas refused to disturb. (o)

Chief J. Gibbs said, "it is perfectly true that the assured are bound to make their election *in the first instance*, whether they will consider the loss as a partial loss, and keep the

(o) *Gernon v. Royal Exch. Comp.* 2 Marshall's Rep. 88. S. C. 6 Taunt. 381.

¹ *Reynolds v. Ocean Ins. Co.* 22 Pick. 191.

goods, or a total loss, and give them up to the underwriters. That is the law in all cases where the assured have an option whether to abandon or not. But it is equally true that by the *first instance* is meant the *earliest opportunity after they have examined into the state of the cargo; and they must have an opportunity of doing that, because it is only by the result of that examination that their decision can be ultimately determined.*" (p)

Time within which notice of abandonment must be given.

What is meant by electing to abandon in the *first instance*, a sea-damaged cargo.

But, although the notice may be thus postponed for the sake of investigating the real state of the damaged property, the privilege extends no further; and the assured cannot lie by and delay giving notice of abandonment in order to ascertain with reference to the state of the markets, or any other considerations, whether it will be most for his advantage to abandon or not. (q)¹

The assured cannot lie by, and delay giving notice of abandonment, in order to ascertain, with reference to the state of the markets or any other consideration, whether it will be most for his advantage to abandon or not.

"Let it not be supposed," says Gibbs, C. J. (in the case, just cited, of *Gernon v. Royal Exchange Company*), "that I accede to the proposition that the assured may use this latitude as an opportunity to judge of the state of the markets, and, as the markets rise or fall, to elect whether he will abandon or not. He has no right to govern his conduct by any such rule: the only examination he may make is into the actual state of the cargo, to ascertain what is the degree of damage, without reference to the state of the market." (r)

Thus, where the assured on goods, upon hearing that they had been sold under a vice-admiralty decree abroad, for the benefit of whom it might concern, immediately sent out powers of attorney to remit the proceeds home; but, *four months afterwards, finding the sales less productive than he expected*, gave notice of abandonment: this notice was held too late. (s)

Notice given *four months* after having taken to proceeds of sale: held too late. *Allwood v. Henckel, Park*, p. 400. 8th ed.

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So where, in a similar case, the proceeds of goods, sold abroad under a vice-admiralty decree, were received by a person to whom, *for three years*, the assured continued to look

Notice given on the insolvency of a party to whom, *for three years* after loss, assured had looked for payment, held too late. *Mitchell v. Edie*, 1 T. Rep. 608.

(p) 2 Marshall's Rep. 91, 92.

United States. † *Livermore v. Newburyport Marine Ins. Comp.* 1 Mass. Rep. 261.

(q) Per Dallas, C. J. in *Hudson v. Harrison*, 3 Brod. & Bingh. 106.

(r) *Gernon v. Royal Exch. Comp.* 6 Taunt. 367. The rule is the same in the

(s) *Allwood v. Henckel, Park*, 400, 8th ed.

¹ See *Teadale v. Charleston Ins. Co.* 2 Brevard, 190.

Time within which notice of abandonment must be given.

Laboring for a month after the submersion of the ship to get up sea-damaged wheat, and then giving notice of abandonment, when found not profitable to send it on: held too late. *Anderson v. Royal Exch. Ass. Comp. 7 East, 38.*

Notice not given till five weeks after notification of the blockade of ship's port of destination: held too late. *Barker v. Blakes, 9 East, 283.*

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for payment, without giving any notice of abandonment, and then only gave such notice when they ascertained that the party to whom they had so given credit had become insolvent: this notice was held too late. (t)

So, where a ship, laden with wheat, was partially sunk, and the assured, instead of abandoning, immediately on receiving this intelligence, first employed themselves for nearly a month after the loss in getting out the wheat on their own account, and then, when nearly the whole of it was got out, *on finding it more damaged than they expected*, gave notice of abandonment: Lord Ellenborough and the whole court held the notice too late. (u) "Must not the assured," says his lordship, "abandon in due time, while, for all that appears, the loss continues total in that sense" (i. e. constructively total); "as, if, in this case, the assured had abandoned while the thing insured remained under water. Now, here it was three weeks or nearly a month before the abandonment, and during all the intermediate time the assured took to the ship and cargo, and worked at it on their own account." (v)

Upon the same principle, where the voyage is delayed or broken up, but the property saved, the owner must give notice of abandonment in the first instance, and cannot first wait to see whether he can prosecute the adventure, and then elect to abandon when he finds that he cannot. Hence, where a ship, in which oil had been insured "from New York to *Havre," was carried into a British port and kept there till Havre was declared by the British government in a state of blockade, a notice of abandonment was held too late which was not given till *five weeks* after the notification of the blockade, "the latest event," Lord Ellenborough said, "to which the loss that gave the right to abandon was capable of being referred." (w)

(t) *Mitchell v. Edie*, 1 T. Rep. 608.

(v) *Anderson v. Royal Exch. Ass.*

(u) *Anderson v. Royal Exch. Ass. Comp. 7 East, 38.*

(w) *Barker v. Blakes*, 9 East, 283.

SECT. IV. *An Abandonment once accepted is irrevocable, and herein of Acceptance.*

§ 406. The law of England agrees with that of France and the United States in holding that, if a notice of abandonment is once accepted by the underwriters, it is irrevocable, unless made under a mistake of fact.¹

An abandonment once accepted is irrevocable, and herein of acceptance.

The underwriters, by their acceptance of the offer to abandon, deprive themselves of all power to object to the grounds on which the abandonment is made, and cannot afterwards refuse to pay the whole sum insured, even though the thing insured should be restored, uninjured, before action brought.

Notice of abandonment once accepted is irrevocable, unless made under mistake of fact.

Thus, in the case of *Smith v. Robertson*, as it appeared that the underwriters had accepted a notice of abandonment, the subsequent restoration of the ship, before action brought, was held not to defeat the right of the assured to recover for a total loss in respect of such notice. The facts were these: The broker gave notice of abandonment to the underwriters (accompanied by the master's protest) on the 19th of October, the day after receiving intelligence of the ship's capture: the underwriters, on the 24th, returned the protest to the broker, with a notification "*that they were satisfied*." On the same evening advice was received of the ship's recapture, and shortly afterwards she was brought into port, where she discharged her cargo, and earned freight. Lord Eldon held, that the underwriters were bound by their acceptance, and "could not be allowed to say that the loss was not total, after they had admitted that it was, and acquiesced in the abandonment as for a total loss." (x)

What constitutes an acceptance.

Return of master's protest, after demand of a total loss, with notification that underwriters are satisfied, is an acceptance. *Smith v. Robertson*, 2 Dow's Parl. Cases, 474.

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As, therefore, an acceptance by the underwriters has these

So is any verbal or written assent, from which an intent to adopt the abandonment may be inferred.

(x) *Smith v. Robertson*, 2 Dow's Parl. Cases, 474. *See also Hudson v. Harrison*, 3 Brod. & Bingh. 153. The effect of an acceptance is well expressed by Boulay-Paty: "Par leur acceptation volontaire il s'est fait un pacte entre les parties qu'a tout terminé." Boulay-Paty, Cours de Droit Comm. tit. xi. sect. 7, vol. iv. p. 380.

¹ The acceptance must be made by persons authorized. *Beatty v. Mar. Ins. Co.* 2 John. 109.

An abandonment once accepted is irrevocable, and herein of acceptance.

important effects, it is desirable to ascertain what acts on their part will constitute an acceptance. In England there is no established form in which it must be conveyed: any verbal or written assent, from which *it may be distinctly inferred that the underwriters intended to adopt the abandonment*, is a sufficient acceptance.

Acquiescence in the abandonment must distinctly appear.

But that which is written or said must *distinctly* show their acquiescence in the abandonment: thus, where, on being informed of the loss, they merely requested that the assured would do the best they could with the damaged property, this was held not to amount to an acceptance. (y)

Mere silence does not amount to acceptance.

The mere *silence* of the underwriters, on receiving notice of abandonment, does not *in itself* amount to an acceptance; for, as Mr. J. Story remarks, "they are not bound to *signify* their acceptance: if they say and do nothing, the proper conclusion is, that they do not mean to accept." (z)

Acceptance may be inferred from acts, without word or writing. *Hudson v. Harrison*, 3 Brod. & Bingh. 97.

It is not, however, necessary that the underwriter should express his assent to the abandonment, either in word or writing: his acceptance may be inferred from his *acts*, when those acts are such as naturally to lead the assured to infer that the abandonment is acquiesced in, and to act accordingly.¹ This is shown by the following case:—The assured, who was interested in a cargo of wines, upon receiving advice that the ship which carried them was stranded and partially sunk with the wines on board, sent immediate notice of abandonment to the underwriters, who thereupon directed *the assured to do the best for all parties, and then took no further step till *two months* afterwards, when, just as the wines were about being sold by public auction, they interfered to stop the sale. The court held, that as by lying by, and taking no step for so long a period, they had induced the as-

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(y) *Thelluson v. Fletcher*, 1 Esp. N. chants' Ins. Comp. 3 Mason's Rep. 27, P. 72. cited 2 Phillips on Ins. 401.

(z) Per Story, J. in *†Peele v. Mer-*

¹ See *Griswold v. N. York Ins. Co.* 1 John. 295; *S. C.* 3 John. 321; *Maryland & Phoenix Ins. Co. v. Bathurst*, 5 Gill & John. 235. "It is very clear," said Mr. Justice Putnam, in *Badger v. Ocean Ins. Co.* 23 Pick. 355, "that if the conduct of the party implies an acceptance of the abandonment, such acceptance is to be legally presumed, notwithstanding the declared intent of the party to the contrary; the actual intent in such case being immaterial." See *Peele v. Merchants Ins. Co.* 3 Mason, 81, per Story, J.; *Reynolds v. Ocean Ins. Co.* 22 Pick. 191.

sured to believe that the abandonment was acquiesced in, they must be considered to have accepted it, and could not, therefore, defend themselves against a claim for a total loss. (a)

An abandonment once accepted is irrevocable, and herein of acceptance.

So, wherever the underwriters, after receiving notice of abandonment, do any act in consequence thereof, which could be justified only under a right derived from it, such act has been held in the United States to be itself decisive evidence of an acceptance.

Any act done by underwriters after notice of abandonment, which could only be justified under a right derived from it, is presumptive proof of an acceptance.

Thus, it has been held in the United States that selling, or taking and keeping possession of a stranded ship after she is got off, though with the ulterior purpose of repairing her for the assured, and even with an express protest against acceptance, yet, if done after abandonment, amounts to an acceptance thereof. (b) ¹

There is no fixed rule in England, as to the time within which an acceptance should be made.

As to the time within which acceptance should be signified.

Lord Eldon, in *Smith v. Robertson*, seemed to consider

(a) *Hudson v. Harrison*, 3 Brod. & Chants' Ins. Comp. 3 Mason's Rep. 27; Bingham 97. 6 Moore, 288.

and see cases cited in 2 Phillips on Ins.

(b) Per J. Story in *Peele v. Merchants' Ins. Co.*, 402, 403.

¹ But see *Peele v. Suffolk Ins. Co.* 7 Pick. 254, which was a case on another policy upon the same vessel and voyage with *Peele v. Merchants Ins. Co.*, and from which it seems that the insurers upon a ship, which is stranded and greatly damaged, may, upon an abandonment of her by the assured, who refuses to repair her, take possession of her and repair her, and if the repairs are made for less than half her value, may restore her to the assured. But, unless the repairs are made within a reasonable time, the insurers forfeit their right to return her, and must be considered as having accepted the abandonment. See *Wood v. Lincoln and Kennebec Ins. Co.* 6 Mass. 479. And the same point has subsequently been so decided, where the insurers refused to accept the abandonment, but took possession of the vessel for the avowed purpose of repairing and restoring her. *Reynolds v. Ocean Ins. Co.* 22 Pick. 191; *Commonwealth Ins. Co. v. Chase*, 20 Pick. 142. In *Reynolds v. Ocean Ins. Co.* 22 Pick. 191, it was decided that, if the insurers, after taking possession of the insured vessel, being stranded, for the avowed purpose of getting her off, repairing and restoring her to the assured, do not, in good faith, proceed to make a full and complete repair and reequipment of the vessel, or if, at the time of the offer by them to restore the vessel as fully repaired and equipped, the assured points out deficiencies which actually exist, and the insurers refuse, or unreasonably neglect to supply such deficiencies, then the assured are not bound by the tender, and the insurers will be deemed to have accepted the abandonment. So, if the vessel is not got off, repaired and offered to be restored within a reasonable time, after the insurers take possession of her for that purpose, they will be deemed to have accepted the abandonment. The insurers, in such case, are bound to use due diligence and despatch, as well in removing, as in repairing the vessel; and want of such diligence and despatch in removing her, operates as a constructive acceptance of the abandonment, although the repairs are afterwards made with reasonable despatch. *Reynolds v. Ocean Ins. Co.* 1 Metcalf, 180.

An abandonment once accepted is irrevocable, and herein of acceptance.

that as the assured was bound to make his election at once to abandon, there was "a corresponding obligation" on the part of the underwriter "to accede to the abandonment, *de presenti* (c);" "evidently showing," says Mr. J. Park, "that he thought the underwriter should say, at the earliest opportunity, whether he will accept the abandonment or not." (d)

Refusal to accept should be communicated in reasonable time.

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The rule, in fact, seems to be, that the underwriter, if he means not to accept the abandonment, should make known his intentions as soon as he has had reasonable time and opportunity for informing himself of the state of the damaged property, and before the assured, in consequence of his silence, can fairly have been led to conclude that he acquiesces in the abandonment. (e)

SECT. V. *Revocation or Waiver of Notice of Abandonment by the Acts of the Assured, &c.*

Revocation or waiver of notice of abandonment by the acts of the assured, &c.

What is a waiver of the abandonment?

§ 407. It appears, therefore, that a notice of abandonment, if it have been once accepted, is irrevocable, except, indeed, by the mutual consent of the parties, and cannot be defeated by any subsequent acts whatever;¹ if, on the other hand, it have not been accepted, it is defeasible either, as we have already seen, by the subsequent restoration of the property, or by acts on the part of the assured clearly showing that he himself, since giving the notice of abandonment, has waived his right to insist on it, by treating the loss as partial, and not total.²

No act done by the master, as agent, on abandonment, for the benefit of those concerned, can amount to a waiver.

It must, however, be carefully borne in mind, that no acts done by *the master*, while acting as agent of both parties, and for the benefit of all concerned, in attempting to recover or repair the damaged property, after notice of abandonment

(c) In *Smith v. Robertson*, 2 Dow, 479.

(e) *Hudson v. Harrison*, 3 Brod. &

(d) Per Park, J. in *Hudson v. Harrison*, Bingh. 97. 6 Moore, 288.
3 Brod. & Bingh. 108.

¹ *King v. Middletown Ins. Co.* 1 Conn. 202.

² See *Curcier v. Philadelphia Ins. Co.* 5 Serg. & R. 113; *Columbian Ins. Co. v. Ashby*, 4 Peters, 139.

has been given, can operate as a waiver by the assured of his right to follow up such notice.¹

If, however, after notice of abandonment given, the master appears to have been acting, not as the agent of both parties, and for the benefit of all concerned, but under the directions, or for the benefit, of the assured exclusively — or if the acts and interference of the assured with the use and management of the subject insured be such as manifestly to show that he intended to act for his own interest as owner, and not for the benefit of the underwriters, then undoubtedly such acts and interference would operate as a waiver of his notice of abandonment. (f)²

*No dealings, however, of the master, or of the assured with the abandoned property will have this effect, unless they unequivocally and unmistakably amount to acts of ownership. Thus, where, on receiving intelligence that their ship and cargo had been carried by a mutinous crew into Barbadoes, and that the government agent there had sold the cargo, but not the ship, the assured in this country immediately gave notice of abandonment, and then wrote to the agent at Barbadoes, directing him to sell the ship also, and remit the proceeds of the sale both of ship and cargo to England, "*us otherwise, they (the assured) could not settle with the underwriters.*" This was held by Lord Eldon and the House of Lords not to be a waiver of the previous notice of abandonment. (g)³

So, where a ship was brought into her home port in such a disabled state, that she was a mere congeries of planks, and being, on survey, found irreparable, except at a cost which

Revocation or waiver of notice of abandonment by the acts of the assured, &c.

If, however, the master acts by the directions, or exclusively for the benefit, of the assured, this is a waiver.

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But no dealings of the master or of the assured with the salvage will have this effect, unless they unequivocally amount to acts of ownership.

Order by assured to sell ship abroad is no waiver of a previous notice of abandonment, if the circumstances justify a sale.

Brown v. Smith, 1 Dow's P. C. 349.

Nor sale, by his order, of an abandoned ship as wreck in her home port.

Allen v. Sugrue, Dans. & Ll. 190.

(f) So decided in the United States in (g) Brown v. Smith, 1 Dow's Parl. † Columbian Ins. Comp. v. Ashby, 4 Cpscs, 349. Peters (S. C.) Rep. 139. See 2 Phillips, 409, 410.

¹ Clarkson v. Phoenix Ins. Co. 9 John. 1. The redelivery of a captured vessel, on bail, to an agent appointed by the master, is not a waiver of all abandonment. Lovering v. Mercantile Mar. Ins. Co. 12 Pick. 348.

² See Martin v. Salem Ins. Co. 2 Mass. 420; Smith v. Touro, 14 Mass. 112; Oliver v. Newburyport Ins. Co. 3 Mass. 37; Chesapeake Ins. Co. v. Stark, 6 Cranch, 272; Columbian Ins. Co. v. Ashby, 4 Peters, 139.

³ See Catlett v. Pacific Ins. Co. 1 Wendell, 561; S. C. 1 Paine, C. C. 595; S. C. 4 Wendell, 75.

Revocation or waiver of notice of abandonment by the acts of the assured, &c.

Cases on the same point in the United States.

Repairs of ship abroad, without consulting underwriters, is a waiver; and devests the right to recover as for a total loss.
Benson v. Chapman, MSS.

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The underwriters cannot, by repairing the ship, compel the assured, who has abandoned, to take to her again.

would have exceeded her repaired value, was sold by the assured, after notice of abandonment, without the concurrence of the underwriters: this seems to have been admitted not to be a waiver of the abandonment. (*k*)

So, in the United States, where the assured, after the underwriters had refused to accept a notice of abandonment made on good grounds, sold the ship under circumstances that justified the sale, not for his own benefit, but for that of all concerned, this was held not to amount to a waiver of his notice. (*i*) Where, on the contrary, he sold her for his own benefit, this was considered as a clear case of waiver (*j*): so, where he bought her in at the sale, and then despatched her on another voyage. (*k*) In one American case, Mr. J. Story laid it down, that if the assured, after notice of abandonment, were to proceed to repair the ship *without consulting the underwriters*, that would be a waiver of the notice; for the reasonable inference would be, that the assured, in such case, was repairing her for his own benefit. (*l*) And on the same ground, where the master at Pernambuco, instead of selling the ship, as he might justifiably have done under the circumstances, repaired her on bottomry, and sent her on to Liverpool, where she arrived earning freight, before action brought, this was held in our Court of Exchequer Chamber to have been a waiver of notice of abandonment, given in this country on hearing of the casualty, so far at least, as to devest the assured from his right to recover thereupon for a total loss. (*m*) The same point was decided in the Supreme Court of Error in New York, where a master repaired at the Isle of France a ship which had been abandoned by the assured at New York on first hearing of the casualty. (*n*)

It has been asserted by Valin, that, if the ship, after abandonment, be repaired and restored to her former state

(*k*) *Allen v. Sugrue*, Dana. & Ll. 190, note (*a*).

(*i*) † *Walden v. Phoenix Ins. Comp.* 5 John. Rep. 510. † See *Livingston v. Hastie*, 3 John. Cas. 293. *Lawrence v. Van Horn*, 1 Caines, 285. †

(*j*) † *Abbott v. Sebor*, 3 John. Cas. 45. See also 2 Phillips on Ins. 409.

(*k*) † *Ogden v. Fireman Ins. Comp.* 10 John. 177; and *S. C.* in error, 12 *ibid.* 25.

cited 2 Phillips, 409. † But see *King v. Middletown Ins. Co.* 1 Conn. 184. †

(*l*) See † *Peele v. Merchants' Ins. Comp.* 3 Mason's Rep. 27, cited 2 Phillips on Ins. 410.

(*m*) *Benson v. Chapman*, in error, MSS.

(*n*) † *Dickey v. American Ins. Comp.* 3 Wend. 658, cited 2 Phillips on Ins. 407. *S. C.* 4 Cowen, 222.

by the labor of the underwriters, they will have a right to compel the assured to take his ship again, notwithstanding the abandonment, provided they have not voluntarily settled as for a total loss, and have acted, in repairing the ship, under protest against the validity of the abandonment. (o)¹ Emerigon denies this position (p), and apparently on good grounds; as to admit such right would be to introduce a new element of uncertainty and confusion into the law of abandonment.

Revocation or waiver of notice of abandonment by the acts of the assured, &c.

A similar question has been raised in the United States, as the effect of an offer by the underwriters, on receiving notice of abandonment, themselves to bear all the expenses of repairing the ship; and the result of the authorities seems to be, (though there has been considerable fluctuation in the decisions,) that, although such an offer is a proper ingredient in considering whether the assured has, in the first instance, a right to abandon, yet it will not, after abandonment, divest his right to recover as for a total loss. (q)²

Nor can an offer by the underwriters to repair divest a right to recover as for a total loss.

* 1178

SECT. VI. *Effect of Abandonment as vesting in the Underwriters the Ownership of the Salvage — Distribution of the Proceeds of the Salvage among the different Sets of Underwriters.*

§ 408. The effect of a *valid* abandonment (that is, in English law, of an abandonment justifiably made at the time, and not defeated by subsequent events) is to transfer the whole interest in all that remains of the thing insured, as far as it is covered by the policy, together with all the rights and liabilities arising out of its ownership, from the assured to the

Effect of abandonment as vesting in the underwriters the ownership of the salvage.

(o) Valin, *Comm. liv. 3, tit. vi. des Assurances*, art. 60. vol. ii. p. 419, ed. Becane, 1828.

(p) Emerigon, *chap. xvii. sect. 6*, vol. ii. p. 231, ed. 1827.

(q) See the cases collected and commented on in *Phillips on Insurance* (vol. ii. pp. 287–293,) and especially the judgment of Mr. J. Story in *Peele v. Merchants' Ins. Comp.* *ibid.* 291, 292.

A valid abandonment transfers to the underwriters all that remains of the thing insured, and all rights and liabilities arising out of its ownership.

¹ So held in Massachusetts, where the costs of the repairs amounted to less than half the value of the vessel. *Reynolds v. Ocean Ins. Co.* 22 Pick. 191; *Peele v. Suffolk Ins. Co.* 7 Pick. 254; *Commonwealth Ins. Co. v. Chase* 20 Pick. 142, cited *ante*, 1174, note.

² See *ante*, 1114, in note, 1174, and note.

Effect of abandonment as vesting in the underwriters the ownership of the salvage.

And it acts as a transfer, by a retrospective operation, from the moment of the casualty.

underwriters, in proportion to the amount of their several subscriptions. (r)

And the true principle seems to be, that it thus acts as a transfer not only from the time that notice of abandonment is given, but, by a retrospective operation, *from the moment of the casualty that gave the right to abandon*,¹ from which time the underwriters, by virtue of the notice of abandonment, are subrogated into the place of the assured, as complete owners of the abandoned property, so far as it is covered by the insurance. (s)²

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*The thing insured when thus transferred by abandonment

(r) Le délaissement équipolle à un transport. (Le Guidon, cap. vii.) Etre translatif de propriété est de l'essence du délaissement. (Valin, liv. 3, tit. vi. des Assurances, art. 60, vol. ii. p. 418. ed. Becane. Emerigon, chap. xvii. sect. 6, vol. ii. p. 230. ed. 1827. Boulay-Paty, Cours de Droit Com. Mar. tom. iv. p. 375, ed. 1834.) L'assuré quitte et délaisse aux assureurs ses droits, noms, raisons, et actions qu'il a en la marchandise chargée. (Le Guidon, ibid.) L'assureur est subrogé à tous les droits de l'assuré, car, en acquérant la chose, il acquiert aussi tous les accessoires. (Pardessus, Cours de Droit Comm. vol. iii. p. 426, ed. 1841.)

(s) Emerigon goes further, and lays it down that abandonment operates as a transfer of the whole interest of the assured to the underwriter, not only from the moment of the loss, but, *from the commencement of the risk (des le principe)*. (Chap. xvii. sect. 6, p. 232, and sect. 9, p. 255, ad. 1827.) The Code de Commerce (art. 385) declares the salvage vested in the underwriters from the period of the abandonment (*de l'époque*

du délaissement), which Boulay-Paty explains as meaning from the time at which notice of abandonment is given (*dès le moment de la signification*). (Cours de Droit Com. Mar. tom. iv. p. 377, ed. 1834.) In the United States it is conclusively settled that the *moment of the loss, and not the commencement of the risk*, is the time from which the transfer takes effect. († Coolidge v. Gloucester Marine Ins. Comp. 15 Mass. Rep. 346, cited 2 Phillips on Ins. 418.) In English law, though never expressly so decided, it seems to be assumed that abandonment acts as a transfer from the moment of loss: the rule that an abandonment to the underwriter on ship vests in him the whole freight in course of being earned at the time of the casualty, is not inconsistent with the position in the text; for a *transfer of ship by bill of sale executed at the moment of the loss*, would be equally entitled to the whole freight then pending and in the course of being earned, there being no apportionment, in our law (except in cases of *pro rata* freight) of pending freight due under an *entire* contract.

¹ Coolidge v. Gloucester Ins. Co. 15 Mass. 346; Schieffelin v. N. York Ins. Co. 9 John. 26; Clarkson v. Phoenix Ins. Co. 9 John. 1; Dederer v. Delaware Ins. Co. 2 Wash. C. C. 61.

² See Robert v. Traders Ins. Co. 17 Wendell, 631; Tyler v. Aina Fire Ins. Co. 12 Wendell, 507; S. C. 16 Wendell, 385; Atlantic Ins. Co. v. Storrow, 5 Paige Ch. 285; Peirce v. Ocean Ins. Co. 18 Pick. 83; Per Putnam, J., in Badger v. Ocean Ins. Co. 23 Pick. 347; Hurin v. Phoenix Ins. Co. 1 Wash. C. C. 400; Chesapeake Ins. Co. v. Stark, 6 Cranch, 268.

to the underwriter is called the *salvage*; and hence it is that losses, which give the right of abandonment, are known, in insurance law, as *salvage losses*, or *total losses, with benefit of salvage*: (an ill chosen term, as it tends to produce a confusion between the property saved in cases of abandonment, and the sums paid as a reward to those who have saved or rescued it, which are also called salvage): the first operation, therefore, of an abandonment is to vest in the underwriters, as owners, from the moment of the casualty, all that remains of the thing insured, the proceeds of which are ultimately distributed among them in proportion to the amount of their several subscriptions, in the manner which we shall presently see. The effect, however, of the abandonment is not only thus to transfer the remains of the abandoned property, but also completely to substitute the underwriter for the assured from the moment of the loss, clothing him from that time with all the rights and all the responsibility of ownership, entitling him to prosecute all claims which belonged to the assured as owner of the thing insured, and rendering him liable for all just demands that might have been made against the assured in the same capacity. (t)¹

Upon this principle it has been decided, that where underwriters had paid a total loss on British ships captured by the Spaniards, they were entitled, as salvage, to the proceeds of Spanish ships captured by way of reprisals, which had been distributed by the British government amongst the assured (u): so the underwriters on freight are entitled, after abandonment, to the benefit of other freight earned, instead of that insured. (v) So, it has been held, that after abandonment for damage arising from collision, caused by the fault of another ship, the underwriters had the same right of action, in the name of the assured, against the owner of such ship, as the

Effect of abandonment as vesting in the underwriters the ownership of the salvage.

The thing insured, when thus transferred by abandonment, is called the "salvage;" and the losses which give rise to abandonment "salvage losses."

* 1180

Cases showing how the underwriters are subrogated in the place of the assured, as far as relates to claims arising out of the ownership of the salvage. *Yeates v. White*, 4 Bingh. N. C. 272.

(t) See *Godsal v. Boldero*, 9 East, 72. (v) *Green v. Royal Exch. Comp.* 1

(u) *Randall v. Cochrane*, 1 Ves. 98. *Marshall*, 447. 6 Taunt 68 S. C. Everth
See also in the United States the *S. P. v. Smith*, 2 M. & Sel. 372; *Brookbank*
in *Gracie v. New York Ins. Comp.* 8, *v. Sugree*, 1 Mood. & Rob. 102.
John. Rep. 183.

¹ See *Smith v. Manuf. Ins. Co.* 7 Metcalf, 448; *Rogers v. Hosack*, 18 Wendell, 331; *Mellon v. Bucks*, 5 Martin, (N. S.) 371; *Union Ins. Co. v. Russell, Anthon*, 128.

Effect of abandonment as vesting in the underwriters the ownership of the salvage.

assured himself had before abandonment, and might recover in proportion to the extent in which the ship was covered by the policy, *i. e.* a moiety of the damage, if half the ship's value were insured, a third, if a third were insured, &c. (*w*) So, in the United States, where the assured, before abandonment, had a right to claim a general average contribution, such claim was held to have been transferred by the abandonment to his underwriters. (*x*)

By not accepting the abandonment or settling for less than a total loss, the underwriter waives all his right to these claims.
Brooks v. McDonnell,
1 Y. & C. 502.

Of course the underwriter, by not accepting the abandonment, or by other acts of the like kind, may lose all title to the ultimate benefit of salvage, as appears by the following case: — A British ship and cargo were captured by the Brazilian government, and condemned as prize for breach of blockade. The underwriters who had insured the cargo would not accept an abandonment, but compromised the claim for 35 per cent. Some time afterwards, in pursuance of a convention between the British and Brazilian governments, the goods were ordered by the latter government to be restored, and compensation made to their owners; a claim was thereupon made by the underwriters to the whole, or a part, of the *sum awarded for compensation, as a salvage: but the court held that, by declining to accept the abandonment, they had waived all claims of this nature, which they otherwise might have had, and were therefore not entitled to any thing. (*y*)

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The underwriter has also imposed upon him all the liabilities of ownership by the effect of the abandonment.

§ 409. As the abandonment thus vests in the underwriter all the privileges, so it throws upon him all the liabilities of ownership.¹

Upon this principle all the expenses incurred by third parties in saving the remains of the property transferred by the abandonment, and restoring it to the underwriters, are to be paid by them as owners thereof:² these charges are generally called the expenses of salvage.

(*w*) *Yates v. White*, 1 Arnold, 85. S. Comp. 11 Serg. & Rawle, 61. 2 Phillips C. 4 Bingham. N. C. 272. 5 Scott, 640. S. on Ins. 420.
L. in the United States. 2 Phillips on Ins. 419, 420. (*y*) *Brooks v. McDonnell*, 1 Y. & C. 502.

(*x*) † *Walker v. United States Ins.*

¹ See *Potter v. Prov. Wash. Ins. Co.* 4 Mason, 298.

² *Abbott, Shipp.* (6th Am. ed.) 555, 556, in note; *The Rising Sun*, Ware, Rep. 384; *The Henry Eubank*, 1 Sumner, 400.

In cases of *recapture* these expenses are fixed by statute (*z*) at one eighth for the royal navy, and at one sixth for private ships, to be assessed on the true value of the recaptured vessel, which is to be ascertained by the policy, if there be no reason to suspect an undervaluation (*a*) : if found in possession of pirates, the salvage is fixed for all ships at one eighth. (*b*) In other cases, no fixed proportion of the property saved is made payable as salvage by the English law ; but the amount to be awarded is left to the discretion of the Court of Admiralty, which is guided in its judgment by a regard principally to the following considerations : 1. The enterprise shown, and danger incurred by the salvors ; 2. The damage and expense from which the property is rescued ; 3. The degree of labor and skill employed in effecting the salvage ; 4. The value of the property saved. (*c*)¹

Effect of abandonment as vesting in the underwriters the ownership of the salvage.

As charges for salvage, &c.

Upon the same ground the underwriters on ship and freight, upon becoming proprietors thereof by virtue of abandonment, are liable, like the shipowner in whose place they stand, for all wages earned by the sailors in the course of the **voyage*, on which the loss occurred that gave rise to the abandonment.²

The underwriter on ship and freight must, after abandonment, pay seamen's wages out of the salvage.

* 1182

If the ship totally perish, and no freight at all be earned, no claim for wages can be made on the underwriters (*d*) ; but if *any portion of the wreck be saved, though no freight be earned*, the mariners who have labored to save the ship from destruction are entitled to be paid wages to the full extent of the proceeds of the wreck. In the United States, Mr. J. Story has considered that the mariner's claim in such case, is

If any portion of the wreck remain, the seamen have a claim for wages, *eo nomine*, though no freight be earned.

(*z*) 33 G. 3. c. 66, s. 42. 43 G. 3, c. case of *The Calypso*, 2 Haggard's Rep. 60, s. 39. 209.

(*a*) Abbott on Shipping, part iv. chap. xi. pp. 525, 526, 6th ed. Park on Ins. 327, 8th ed.

(*c*) See the judgment of Sir John Nichol in the case of *The Clifton*, 3 Haggard, 117.

(*b*) 6 G. 4, c. 49, s. 3 ; and see the

(*d*) Emerigon, chap. xvii. sect. 11. vol. ii. p. 263, ed. 1827.

¹ A ship being abandoned to twenty-three different underwriters, it was held that they were not jointly liable, as co-partners, for repairs done upon the ship. *United Ins. Co. v. Scott*, 1 John. 106.

² Abbott on Shipp. (6th Am. ed.) 656, in notes ; *Hammond v. Essex Fire and M. Ins. Co.* 4 Mason, 196 ; *McBride v. Mar. Ins. Co.* 7 John. 431 ; *Coolidge v. Gloucester Ins. Co.* 15 Mass. 341. But see *Brooks v. Dorr*, 2 Mass. 39 ; *Richardson v. Maine F. and M. Ins. Co.* 6 Mass. 102.

the same rule does not extend to incumbrances or liens, with which the property was burdened by the assured, by contracts with third parties, before the casualty took place, and not arising out of the peril insured against. (i)

Effect of abandonment as vesting in the underwriters the ownership of the salvage.

A question has arisen, whether, upon an abandonment of a sea-damaged cargo to the underwriter on goods, the abandonnee takes the salvage subject to the shipowner's claim for freight; whether it be the full freight earned by their subsequent arrival in the original or a substituted ship, or the *pro rata* freight which becomes due, on their acceptance by the merchant at the port of distress: in this country it was long ago decided, in the case of *Baillie v. Moudigiani*, and is undoubtedly established as the general rule, that the assured cannot in such cases throw the loss on freight upon the underwriters on goods, and this on the plain principle, that they have not, by the terms of their contract, engaged to indemnify him against it, and that the abandonment, although its effect is to subrogate the underwriters in the place of the assured, yet only does this to the extent of the insurance, which in a general policy on goods does not cover the freight. (j) The question was recently litigated before the Supreme Court of the United States, and it was there solemnly decided that such claim could not be supported, and that, if the underwriter on goods had been obliged to pay *freight in such case to the shipowner, in order to obtain possession of the salvage, they might either deduct the amount so paid from the loss, or, if a total loss had been previously settled, recover it from the assured as money paid to his use. (k) Mr. J. Johnson, indeed, dissented from the opinion of the majority of the court, on the ground that, as the abandonnee of ship is entitled to the freight earned subsequent to the loss, the abandonnee of goods ought, by parity of reason, to be liable thereto. Mr. Phillips, while he admits that the two cases are not sufficiently analogous to give much weight to this argument, yet inclines to the opinion that this charge

The underwriters on goods as abandonnees of a sea-damaged cargo, are not liable, generally speaking, to the shipowner's claims for freight.

Law same in United States.

*1184

(i) So held in the United States in a case where the ship had been bottomried before she became the property of the assured. † *Williams v. Smith*, 2 Caines, 20, cited 2 Phillips on Ins. 423. Ins. 116, 8th ed. { See Case v. Baltimore Ins. Co. 7 Cranch, 358. }

(k) † *Columbian Ins. Comp. v. Catlett*, 12 Wheaton Rep. 383, cited 2 Phillips on Ins. 425-427; and see the judgment of Mr. J. Story, as there given.

(j) *Baillie v. Moudigiani*, Park on

Effect of abandonment as vesting in the underwriters the ownership of the salvage.

Where sea-damaged goods are sold at intermediate port instead of being sent on, in order to prevent their perishing, the underwriter on goods, in practice, bears the loss on the freight.

Quære, whether he also bears the extra expenses of transhipment.

In no case, as it seems, can he decline taking to the salvage on account of the excess of freight over the value of the goods.

1185*

Even without abandonment the underwriters are entitled to the salvage, or the proceeds thereof.

ought to fall on the abandonee of the goods, on the ground that he is the party who, as owner of the salvage, alone derives benefit from their transportation. (l) ¹

It is on this ground that it is stated to be the practice in this country, to charge the underwriter on goods with the freight, whenever the goods, having been necessarily landed at a port of distress for the repairs of the ship, are sold there, instead of being reshipped, because, if sent on, they would be totally spoiled before arrival: in such case it is considered, that the sale is for the benefit of the underwriters, who, on abandonment, or payment of a total loss without abandonment, become entitled to the proceeds of the sale, and must, therefore, pay whatever freight is due to the shipowner (m): on the same principle, as we have elsewhere seen, it has been contended, but never so decided in this country, that the abandonee of goods which are transhipped at the port of disaster, and forwarded in another vessel, ought to be liable for the extra freight and increased charges of the transhipment. (n)

Mr. Phillips raises the question, whether in such cases, supposing the freight to exceed the worth of the salvage, the abandonee of goods is bound to take to the salvage, and *states his opinion, that, under the circumstances supposed, the underwriter on goods might pay a total loss, and decline taking to the salvage, provided he gave speedy notice of his intention so to do. (o) I confess it seems to me, that in such case, standing, as he does, by virtue of the abandonment, in place of the assured, he would have no more right to repudiate the ownership of the goods, on this ground, than the assured himself. (p)

§ 410. Hitherto we have spoken solely of the effects of

(l) 2 Phillips, 428-430.

(m) Stevens on Average, 81, 5th ed. and Appendix, 264.

(n) See Part I. Chap. VIII. Sect. III. p. 188, *antè*.

(o) 2 Phillips, Ins. 438, 439.

(p) As to the general right of the owner

of the goods to abandon them for freight, see a clear and concise summary of the law in 3 Kent's Comm. (5th ed.) 224, 225. It has been decided in the United States, that no such right exists. † *Griswold v. New York Ins. Comp.* 3 John. Rep. 321.

¹ See *Teasdale v. Charleston Ins. Co.* 2 Brevard, 190, cited *antè*, 1156, in note.

an abandonment, and confined our attention to "salvage losses," as they are called, "with benefit of abandonment:" it must, however, be clearly understood, that even where no notice of abandonment has been given, but a total loss has taken place (*i. e.* in what are called cases of "salvage loss without abandonment,") the same rule applies, and the underwriter, who has adjusted and paid a total loss, is, by virtue thereof, entitled to the benefit of any salvage that may ultimately come to hand, or the proceeds of any sale of the property that may have been made by the assured, or the master as his agent:¹ thus, in the case of a missing ship, where there had been no abandonment, Chief J. Gibbs said, that "the underwriters, on payment of a total loss, would of course be entitled to the ship, if she afterwards turned up, as salvage." (q) So, in the case of sea-damaged goods sold in specie at an intermediate port, Lord Abinger said, that "the proceeds of such sale would be considered as salvage, to which the underwriters would be entitled, after payment of a total loss, as for money had and received to their use." (r)

Effect of abandonment as vesting in the underwriters the ownership of the salvage.

As in case of a missing ship.

Or goods sold sea-damaged.

If, however, after adjustment and payment for a total loss, the whole of the thing insured be recovered (as where a box of bullion was fished up and restored after its full insured value had been paid,) the underwriter will not, on that account, be entitled to reclaim from the assured the whole amount of his subscription, but merely the thing saved, or its value after deducting the expenses of saving it. (s)

Recovery of the whole thing insured after payment for a total loss, will not entitle the underwriter to recover back the amount he has paid.

* 1186

And the same principle applies, where, after the underwriter has paid, not a total loss, but a certain percentage of his subscription, a part of the proceeds of the thing insured is returned to the assured, under such circumstances, that the

So, if he pay half his subscription, and half the thing insured be afterwards restored, so that its proceeds added to the sum paid make more than the whole amount of the insurance.

(g) *Houstan v. Thornton*, Holt's N. Pr. 242.

(r) *Roux v. Salvador*, 3 Bingh. N. C. 268.

(s) *Da Costa v. Firth*, 4 Burr. 1966.

¹ *Gracie v. N. York Ins. Co.* 8 John. 183. See the remarks of Mr. Justice Story, in *The Ship Henry Eubank*, 1 Sumner, 400, 405. Where the insured vessel is broken up and sold, in consequence of an injury received, without abandonment to the underwriters, and a suit is brought on the policy, the proceeds of the materials sold are to be deducted from the sum which the assured would be entitled to recover, if there had been an actual total loss of the vessel; and a verdict was set aside in a case where the assured took it without having previously made this deduction. *Smith v. Manuf. Ins. Co.* 7 Metcalf, 448, 454.

Effect of abandonment as vesting in the underwriters the ownership of the salvage.

part so restored to him, together with the percentage paid by the underwriter, exceed the whole amount of the insurance: the underwriter is not, on this account, entitled to recover back any part of the percentage he has paid, for, as Chief Justice Gibbs expresses it, although the assured cannot recover, *as against the underwriter*, more than the amount of his subscription, there is no rule to prevent him from recovering more *undequâque*. (t)

Distribution of the salvage amongst the underwriters: general rule.

§ 411. Upon abandonment each of the underwriters participates in the benefits of the transfer, by sharing in the proceeds of the salvage, according to the proportion which the amount of his subscription bears to the whole value of the thing insured; and this without any regard to the date of the different subscriptions, or the priority of the policies, if more than one. (u)

In cases of double or over insurance.

If there be more than one policy, and the sum insured in the first policy, itself amounts to the value of the thing insured, the law of France is, that an abandonment to the underwriters on the first policy carries the whole property in the thing insured, and there will be nothing to abandon to the underwriters on the subsequent policies (v)¹: in such case, *accordingly, the policy first effected is alone considered binding, and the underwriters on the rest are discharged from all claim; and are, of course, entitled to no share in the salvage. (w)

1187*

In our own country a different rule prevails; and the assured in such case may sue both sets of underwriters, but can only recover up to the amount of his loss, to which all the underwriters on both policies shall contribute according to the amount of their several subscriptions, and are, of

(t) *Tunno v. Edwards*, 12 East, 488. *Goldamid v. Gillies*, 4 Taunt. 803.

(u) Valin, *Comment. sur l'Ordonnance*, tit. vi. art. 25, vol. ii. p. 292, ed. 1829. Emerigon. chap. xvii. sect. 6, vol. ii. p. 230, *ibid.* pp. 273-275, ed. 1827. Boulay-Paty, *Cours de Droit Mar.* tit. xi. sect. 7, vol. iv. p. 375, ed. 1834.

(v) Boulay-Paty, *Cours de Droit Mar.* tit. x. sect. 20, vol. iv. pp. 116-121, ed. 1834. Pardessus, *Cours de Droit Comm.* part iv. tit. v. vol. iii. p. 505, ed. 1841.

(w) *Ordonnance de la Marine*, tit. vi. art. 24, 25. *Code de Commerce*, art. 358, 359.

¹ See *Higginson v. Dall*, 13 Mass. 96.

course, entitled to a proportionate share of the proceeds of the salvage. (x)

Distribution of the salvage amongst the underwriters.

Where the whole interest is not covered.

On the other hand, if the total amount covered by all the subscriptions or policies does not equal the value of the thing insured, the assured is considered to be his own insurer to the extent of the sum not covered, and is consequently entitled, to that extent, to his proportionate share in the proceeds of the salvage. (y) Thus, suppose A. to have insured goods, the real value of which is 1000*l.*, for 800*l.*, of which sum B. subscribes for 500*l.*, and C. for 300*l.* A., it is plain, stands his own insurer for 200*l.*: a constructive total loss takes place on the goods, in respect of which A. abandons: the proceeds of the salvage amount to 100*l.* *i. e.* a *tenth part* of the whole insurable value of the goods: this salvage, therefore, must be distributed among the parties to the insurance in the proportion of a *tenth* of their respective interests.

To A. for his 200 <i>l.</i> uncovered by the policy	-	£20
To B. for his 500 <i>l.</i> insured	- - -	50
To C. for his 300 <i>l.</i> insured	- - -	30
		<hr/>
		£100
		<hr/>

* 1188

*If there be three insurances, one on the *ship and cargo*, one on the *ship* only, and one on the *cargo* only, a question has been raised as to the mode in which the salvage should be shared amongst the different sets of underwriters: Emerigon adopts a mode of adjustment whereby the underwriters on ship and cargo, though they may have insured only the same amount that has been subscribed for by the underwriters on the two separate interests respectively, shall yet be entitled to a double share of the effects abandoned: Mr. Marshall recommends the following more equitable method, by which all would take an equal share in the salvage. Take the following data: let a ship, valued at 5000*l.*, and a cargo at

Mode of apportioning the salvage where there are three policies: one on *ship and cargo*, one on *ship* alone, and one on *cargo* alone.

(x) Newby v. Reid, 1 El. Rep. 416. be altered by express clauses in the policy. Marshall on Ins. 139-145. The law is 2 Phillips on Ins. 423-425.

the same in the United States. Kent's (y) 2 Phillips on Ins. 421. Emerigon, Comm. vol. iii. p. 280, ed. 1844: but may chap. xvii. sect. 14, vol. ii. pp. 273-275, ed. 1827.

Distribution of
the salvage
amongst the
underwriters.

5000*l.* (making a total of 10,000*l.*,) be insured by three policies, thus:—

On ship and cargo	-	-	-	-	£3000
On the ship only	-	-	-	-	3000
On the cargo only	-	-	-	-	3000
Uninsured	-	-	-	-	1000
					<hr/>
					£10,000
					<hr/>

A shipwreck happens, and the net proceeds of the wreck of the ship are 500*l.*, and of the sea-damaged cargo 500*l.*, total 1000*l.* The adjustment should be as follows:—

To the owners, for their part of ship and cargo uninsured	-	-	-	-	-	£100
To the insurers on <i>ship and cargo</i> , a moiety of three fifths of the produce of the <i>wreck</i>	-	-	-	-	-	150
And a moiety of three fifths of the produce of the <i>cargo</i>	-	-	-	-	-	150
To the insurers on <i>ship</i> three fifths of the produce of the <i>wreck</i>	-	-	-	-	-	300
To the insurers on <i>goods</i> three fifths of the produce of the <i>cargo</i>	-	-	-	-	-	300
						<hr/>
						£1000
						<hr/>

1189 *

The French law provides that the proceeds of the salvage shall be divided equally between the underwriters and the lenders on bottomry.

*The Ordinance de la Marine decreed, that where money had been lent on bottomry, and also insured on the same subject, the lender on bottomry, in case of abandonment, should be paid the full amount out of the proceeds of the salvage, to the entire exclusion of the underwriters, supposing the salvage not sufficient for both. (z) Emerigon (a) and Pothier (b) rested this law on the principle, that the underwriter, by virtue of the abandonment was put exactly in the place of the assured, and, therefore, could not dispute the claim of the bottomry lender, who had become his creditor by the effect of this entire subrogation. Valin (c) opposed

(z) Tit. Contracts à la Grosse, art. 18.

(b) Traité des Contrats à la Grosse, No. 49.

(a) Chap. xiii. sect. 12, vol. ii. p. 269, ed. 1827.

(c) Comment. on Ord. tit. à la Grosse, art. 18, vol. ii. p. 205, ed. 1829.

this view, on the ground that abandonment is not an absolute substitution of the underwriter for the assured, but only to the *extent of the insurance*; that, consequently, the underwriter becomes upon abandonment a debtor to the bottomry lender, only in the proportion which the sum insured bears to the whole of the subject; and that, on principle, the bottomry lender and underwriter ought both to share in the benefit of the abandonment, in proportion to their respective interests.

Distribution of the salvage amongst the underwriters.

These reasonings of Valin were adopted in the French Legislative Council (*d*); and the 334th article of the Code de Commerce accordingly provides, that, upon abandonment, the proceeds of the property saved shall be divided equally between the lender on bottomry, in proportion to his capital, and the underwriter for the amount insured in the policy. (*e*)

This seems a very equitable rule, and should, it is submitted, be adopted in this country, notwithstanding the old rule that there can be no salvage in bottomry contracts, — a rule which was long since repealed by the legislature in regard to East India voyages (*f*), is opposed to the general law maritime of Europe, and, as Mr. Marshall and Mr. Benecké have very conclusively shown, seems wholly inconsistent with sound principle. (*g*)

The rule would, perhaps, be the same in this country.

* 1190

SECT. VII. *Duties of the Master in cases of Abandonment, as Agent for whom it may concern.*

§ 412. By the general law maritime, as recognized alike in this country and foreign states, the assured is bound, on the occurrence of any casualty, which authorizes an abandonment, to use his utmost endeavors to rescue from destruction, or to reclaim from capture the property insured, so as to lighten, as far as possible, the burden which is to fall on the underwriters. In so doing he is considered to be the agent of the underwriters, and the exertions he makes in such capacity

Duties of the master in cases of abandonment, as agent for whom it may concern.

On the occurrence of any constructive total loss, the assured is bound to use his utmost exertions for the recovery of the salvage.

(*d*) See Boulay-Paty, Cours de Droit Mar. tit. ix. sect. 20, vol. iii. pp. 227-232.

(*f*) 19 G. 2. c. 37.

(*g*) Marsh. on Ins. 768, 769. Benecké, Pr. of Indem. 74-83.

(*e*) Code de Commerce, art. 334.

Duties of the master, in cases of abandonment, as agent for whom it may concern.

And, in so doing, shall not prejudice his right to abandon and recover for a total loss.

On the construction of the clause empowering the assured to labor, &c., for the recovery of the salvage.

1191 *

The master, in taking every necessary step for the recovery and safeguard of the salvage, is the agent of those ultimately entitled to it.

If a valid abandonment be made, he is agent of the underwriters from the moment of the loss.

do not at all prejudice his right to insist on his abandonment.¹

— This generally recognized right is expressly conferred on the assured in our English policies, by a special clause to the following effect: — “*and in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labor, and travail, for, in, or about the defence, safeguard, or recovery of the said goods and merchandises, or any part thereof, without prejudice to the insurance, &c.*”

The clause only says, “*it shall be lawful*” for the assured so to do; but the law and practice of this, and almost all other, countries imposes it upon him *as his bounden duty*: the Code de Commerce, in order to remove all ambiguity, has adopted the suggestion of Valin (*h*) and Emerigon (*i*), and expressly enacted, that the assured is *bound* so to exert himself, “*que l’assuré doit travailler,*” &c. (*j*)

* Immediately, therefore, that the emergency arises, and before notice of abandonment has been given, the master is bound to take every necessary measure for the defence, safeguard, and recovery of the thing insured; in so doing he acts as the agent for both parties, or, more accurately speaking, as the agent of the party who may eventually turn out to be interested in the salvage, and, as such, derive benefit from his exertions. (*k*)²

If no abandonment be made, that party is, of course, the assured himself: it is as agent for the assured that the master will turn out to have acted, and it is to the assured himself he must look for making good all the expenses *bonâ fide* incurred by him in his endeavors to save the property insured.

If, however, an abandonment be made, which is either accepted, or ultimately proves effectual, the effect of such

(A) Comm. liv. iii. tit. vi. des Assurances, art. 45, vol. ii. p. 337, ed. Becane, 1828.

(i) Emerigon, chap. xvii. sect. 7, vol. ii. p. 235, ed. 1827.

(j) Code de Commerce, art. 381. See also Boulay-Paty, Cours de Droit Mar. tit. xi. sect. 5, tom. iv. pp. 308 - 310, ed. 1834.

(k) 3 Kent's Comm. (5th ed.) 331.

¹ Lee v. Boardman, 3 Mass. 247; Gardiner v. Smith, 1 John. 141; Jumel v. Mar. Ins. Co. 7 John. 423, 424; *Ans.*, 196 to 198, and cases in notes; Gardere v. Col. Ins. Co. 7 John. 514; Curcier v. Phil. Ins. Co. 5 Serg. & R. 113.

² Smith v. Manuf. Ins. Co. 7 Metcalf, 448, 453.

abandonment is, as we have seen, to constitute the underwriter owner of the property, from the *moment of the casualty*, and, therefore, to make the master, by operation of law, the agent of the underwriters in all that he has done *bonâ fide* for the recovery of the property from that time.¹

Duties of the master, in cases of abandonment, as agent for whom it may concern.

On this principle it is, that if a captured ship be repurchased by the master, in cases where *no* notice of abandonment is given, he is considered to have effected such repurchase as agent for the owners: and, if the transaction be legal, and the master have acted *bonâ fide* and within the authority which the necessity of the case may reasonably be supposed to have conferred on him, the assured will be bound by his acts, and thereby precluded from recovering a total loss, if the ship is restored to the country of her owners before action brought. (*l*)

Repurchase of ship by master where no abandonment has been made, is considered to be for the benefit of the owners, and will defeat right to recover for a total loss if ship arrive before action brought.

Where, however, under similar circumstances, notice of abandonment has been given and accepted, and the repurchase not effected by the master till after such notice, it *has been decided in the United States, that as the master, in consequence of the abandonment, became the agent of the underwriters, so the repurchase was for their benefit, if they chose to take it. (*m*)²

Aliter, where notice of abandonment has been given and accepted.

* 1192

The following case in the United States was decided on, and affords a good illustration of, these principles; an American ship and cargo was captured by a French privateer and carried into Malagar, where the cargo was ultimately condemned as lawful prize, and sold for the benefit of the captors. On receiving intelligence of the capture, the assured in New York abandoned to the underwriters on the

Sale of cargo abroad in cases of abandonment, ensures to the benefit of the underwriters if they choose to take to it, however profitable it may be.

(*l*) *M^r Masters v. Schoolbred*, 1 Esp. (m) So held by Chancellor Kent (then 238. *Wilson v. Forster*, 6 Taunt. 25. 1 Ch. J.) in *† Jumel v. Marine Ins. Comp.* Marshall's Rep. 426. 7 John. 423, 424.

¹ *Smith v. Manuf. Ins. Co.* 7 Metcalf, 448, 453, per Shaw, Ch. J. And, in this latter case, stated in the text, if the salvage has been squandered, the loss falls on the underwriters. *Ib.* See also *Bryant v. Commonwealth Ins. Co.* 6 Pick. 131; *Center v. Amer. Ins. Co.* 7 Cowen, 564; *Columbian Ins. Co. v. Ashby*, 4 Peters, (S. C.) 139; *Gardere v. Col. Ins. Co.* 7 John. 514; *Miller v. Depeyster*, 2 Caines, 301; *Pierce v. Ocean Ins. Co.* 18 Pick. 83; *Smith v. Touro*, 14 Mass. 112; *The Sarah Ann*, 2 Sumner, 206.

² See *Lawrence v. New Bedford Comm. Ins. Co.* 2 Story, C. C. 471; *Jumel v. Mar. Ins. Co.* 7 John. 423, 424.

Duties of the master, in cases of abandonment, as agent for whom it may concern.

cargo, who paid a total loss ; meanwhile a mercantile house at Malaga, at the request of the master, had purchased the cargo on its being put up for sale, *for the benefit and on account of the assured*, and whomsoever else it might concern ; considering themselves, in so doing, to have been acting as agents for the assured, to whom they would have had recourse for payment in case any loss had taken place on the purchase. Instead, however, of any loss occurring, the cargo was sold again by the Malaga house, for nearly twice the amount they gave for it ; and the surplus produced by this sale was held by them as trustees, either for the assured or the underwriters, according to the determination of the court. The court held that this surplus belonged to the underwriters : Chief J. Kent said : “ the assured abandon and the underwriters accept and pay, they were then substituted for the assured, and succeeded to the benefit of the acts of the agents abroad ; the merchants at Malaga acted, nominally, as agents for the assured, but in reality, they were agents for the party having the ultimate claim to the property.” (n)

The master, in fact, is agent of the assured until abandonment : on abandonment he becomes the agent of the underwriters in all that he has done *bond fide* from the time of the loss.

1193 *

The underwriters may accept the acts of the master as their agent, or repudiate them and leave the consequences to fall upon him.

Several cases, to a similar effect, have been decided in the United States, all tending to establish the position, that the master, although agent of the assured before the abandonment, becomes, by abandonment, the agent of the underwriters from the moment of the casualty : the ground of this doctrine being, that, as the interest in the salvage is thereby transferred to them from that time, the agency is transferred with the subject. (o) ¹

It has also been decided in the United States, that, though the underwriters, after abandonment, are entitled to affirm such repurchase, yet they are not bound by it, unless they elect to take to it. “ The insurer,” says Chancellor Kent, “ can accept of the repurchase by the master, as his constructive agent, and affirm the act, or he can leave it to fall upon the master.” (p)

(n) † United Ins. Comp. v. Robinson, of perusal. See especially † Columbian Ins. Comp. v. Ashby, 4 Peters (S. C.) in error, 1 John. 591.

(o) See these cases collected in 2 Phillips Rep. 136.
on Ins. 439-449 : they are well worthy (p) 3 Kent's Comm. (5th ed.) 332.

¹ See Lawrence v. New Bedford Commercial Ins. Co. 2 Story, C. C. 471.

SECT. VIII. *Recovery of more than the Amount of the Insurance.*

§ 413. It is quite clear that the assured can recover for a total loss, *as such*, only the amount of the insurance, or the agreed value in the policy: the only question is, whether he can recover, in addition to this, the amount of any average or partial loss sustained before the happening of the casualty, in respect of which the total loss is paid.

As to this, it is now established in our law, 1. That he cannot so recover when the previous partial loss consists merely of sea damage; 2. That he may so recover when it consists of repairs actually made before the total loss incurred, and this, either as expenses incurred by him under the special clause, in laboring and traving for the defence, safeguard, and recovery of the thing insured, or else as a *substantive average loss, though the former seems unquestionably the more correct and preferable mode of stating the claim.¹

Recovery of more than the amount of the insurance.

The assured, in addition to a total loss, may recover the expenses of repairs actually done, or other expenses necessarily incurred about the thing insured, before the occurrence of the casualty which gave the right to abandon.

* 1194

The following are the cases that have established this doctrine in English law:—

A ship, "*warranted free from American condemnation*," in attempting to escape an American embargo then in force, ran out of New York in the night, and sustained an average loss by stranding on the rocks of Governor's island, where she was deserted by her crew, and next day was seized there by the Americans, and condemned by them for breach of the embargo: the assured claimed a total loss; but the court held that he could recover nothing; not a total loss, for that was caused by American condemnation, a risk expressly ex-

Prior average loss by sea-damage unrepaired, merges in a subsequent total loss, and cannot be recovered cumulatively thereto. *Livie v. J'ansen*, 12 East, 648.

For this position the learned commentator cites the following authorities:—

† *Sadler v. Church*, 2 Caines's Rep. 287.

† *Jumel v. Marine Ins. Comp.* 7 John.

412. † *United. Ins. Comp. v. Robinson*,

2 Caines's Rep. 280. † *Willard v. Dorr*,

3 Mason, 161. These cases will be found collected and commented on in Phillips on Ins. vol. ii. pp. 439 - 449, chap. xvii. sect. 16. "Effect of Abandonment as to the Conduct of Agents."

¹ See *Potter v. Prov. Wash. Ins. Co.* 4 Mason, 300; *Jumel v. Mar. Ins. Co.* 7 John. 423, 424.

Recovery of more than the amount of the insurance

Doctrine as stated by Lord Ellenborough.

cepted by the policy ; not an average loss, because the total loss, by subsequent seizure and condemnation, took away the right to recover in respect of the previous partial loss by sea damage. (q)

Upon the general question, Lord Ellenborough said, — “ There may be cases in which, though a prior damage may be followed by a total loss, the assured may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss. *Actual disbursements for repairs, in fact, made, in consequence of injuries by the perils of the sea, prior to the happening of the total loss,* are of this description, unless, indeed, they are to be more properly considered as covered by that authority with which the assured is generally invested by the policy, ‘ of suing, laboring, and travelling for, in, or about the defence, safeguard, and recovery of the property insured ; ’ *in which case, the amount of these disbursements might more properly be recovered as money paid for the underwriters under the direction and allowance of this provision of the policy, than as a substantive average loss to be added cumulatively to the total loss which is afterwards incurred in consequence of the sea risks.*” (r)

1195 *

Actual disbursements for repairs, in fact, made prior to the total loss, may be recovered in addition thereto ; either as a substantive average loss, or under the clause “ to sue, labor, travail, &c.” in and about the recovery of the thing insured. *Le Cheminant v. Pearson*, 4 Taunt. 367.

*In the next case of the same kind that came before the courts, the previous partial loss was of the description alluded to by Lord Ellenborough, and consisted of actual disbursements for repairs in fact made prior to the total loss ; in this case the policy was on ship “ at and from Jersey to Norway ; ” the ship while lying in port at Jersey, before sailing, sustained an average loss by sea damage, *which the plaintiff repaired* ; having been afterwards totally lost, by capture in the course of the voyage, the plaintiff brought his action for a total loss, and claimed also, in his declaration, to recover in respect of the expenses incurred in the repairs of the previous partial loss, by virtue of the clause in the policy empowering him to sue, labor, and travail in, and for, the defence, safeguard, and recovery of the ship. The Court of Common Pleas held that the plaintiff might recover, in addition to a total loss, for the sums so expended ; and Sir J. Mansfield remarked, that he might so recover, either as

(q) *Livie v. Jansen*, 12 East, 648.

(r) 12 East, 655.

for an average loss from damage repaired, or as expenses incurred under the permission in the policy, "to sue, labor, travail," &c. (s)

Recovery of more than the amount of the insurance.

The same principles were acted upon in the following case : — A ship, having sailed from Calcutta for England, was so damaged in the Hoogley, by collision with a steamer, that she was obliged to put back : on this first occasion she was *re-coppered*, and again put to sea ; being a second time forced to return to Calcutta, in a very disabled state, her wales, &c. were stripped off, in order to examine her timbers, which being found, on survey, to be so shattered and decayed as not to justify her repair, she was sold as a wreck, with all her appurtenances, including *the wales, which had never been replaced, but were sold with the rest of the ship as they lay by her side in the ship-builder's yard.* The plaintiff, under a declaration alleging that he had been put to great expenses in suing, laboring, and traveling for the recovery of the ship, and in the necessary repair of damage done to her before she was totally lost, claimed to recover, in addition to *a total loss, the actual expenses incurred in *re-coppering* her on the first occasion, and the estimated expense *which would have been incurred in replacing the wales*, which had been stripped off, in order to examine her timbers, on the second occasion. The court, on the principles already developed, held that he was entitled to recover in respect of the first item, but not in respect of the second, that being an expense which might have been, but, in *point of fact, never was, incurred.* (t) Even had actual expense been incurred in replacing the wales, Mr. J. Maule was of opinion that, under the circumstances, it could not have been thrown upon the underwriters, on the ground that the assured cannot recover even for expenses actually incurred, except where they have been also prudently and properly incurred, which in this instance would clearly not have been the case. (u)

The expense of a previous *re-coppering actually done*, is recoverable in addition to a total loss ; not so the estimated cost of *replacing planks* stripped off the ship in order to examine her timbers, and *never replaced, but sold with the rest of the ship as wreck.*

Stewart v. Steele, 5 Scott, N. R. 927.

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Expenses must be prudently and properly incurred, or they will give no claim.

The principles thus established in our jurisprudence have been adopted and confirmed in that of the United States (v) ;

Law in the United States is the same.

(s) *Le Cheminant v. Pearson*, 4 Taunt. 367.

(*) See the judgment of Maule, J. *ibid.* 948 - 950.

(t) *Stewart v. Steele*, 5 Scott, N. R. 927. See also *Blackett v. Royal Exch.* Ass. Comp. 2 Cr. & J. 244.

(v) See the cases collected 2 Phillips on Ins. 464 - 467.

Recovery of more than the amount of the insurance.

The expenses must be the necessary and direct consequences of some peril insured against, and fall within the scope of the clause "to sue, labor, travail," &c.

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Expenses of reclaiming captured property. *Alien*, in cases of embargo.

General average, if due before total loss, is recoverable cumulatively thereto.

Law in France on this point. Opinions of French jurists divided.

and it has also been there laid down, in conformity with the remarks of Mr. J. Maule in the case last cited, that these expenses, in order to give a claim against the underwriter in addition to a total loss, must have been *necessarily* incurred in laboring for the safety and recovery of the subject insured (*w*), and, if claimed under the clause in the policy permitting the assured so to labor, &c., must be shown to have arisen from a prosecution of the *direct objects* contemplated by the clause. (*x*) Thus an *extra* allowance of a dollar a day promised and paid by the assured to the captain for remaining by the property *after capture*, and using his best efforts for its recovery, was there held not to be recoverable from the underwriter in addition to a total loss. (*y*) On the other *hand, expenses necessarily and *bonâ fide* incurred by the captain in *cases of capture*, for the delivery of the captured property, as by prosecuting an appeal, &c. may be recovered cumulatively to a total loss. (*z*) In a case of *embargo*, again, where the underwriters refused to accept abandonment, and the assured, who might have sold the ship, instead of doing so, or laying her up, chose to keep on the crew under wages, it was held, that he could not throw this expense, which, under the circumstances was *unnecessary*, and uncalled for, on the underwriters (*a*): where, however, any contribution in the nature of general average has become due from the assured, previously to a total loss, it has been held that this may be recovered in addition to a total loss. (*b*)

In France, on the other hand, after some fluctuation in the authorities, the question has finally been decided against the right to recover, under any circumstances, for an average, in addition to a total, loss. Valin (*c*), indeed, and Pardessus (*d*), while they admit that such claim can only be made by virtue of the permissive clause, "to sue, labor, travail," &c. yet

(*w*) † *M'Bride v. Marine Ins. Comp.* 7 John. Rep. 483, cited 2 Phillips, 466.

(*x*) 2 Phillips Ins. 465.

(*y*) † *Watson v. Marine Ins. Comp.* 7 John. Rep. 57. This may also be put on the ground that the promise and payment to the captain were without consideration, he being bound, without *extra* pay, to do his best for the interests of all concerned.

(*z*) † *Lawrence v. Van Horne*, 1

Caines, 284. *Watson v. Marine Ins. Comp.* 7 John. 57.

(*a*) † *M'Bride v. Marine Ins. Comp.* 7 John. Rep. 483.

(*b*) † *Barker v. Phoenix Ins. Comp.* 8 John. Rep. 245. 2 Phillips on Ins. 466.

(*c*) Comm. tit. vi. des Assurances, art. 45, tom. ii. p. 338, ed. Becane, 1828.

(*d*) Cours de Droit Comm. tom. iii. p. 483, ed. 1841.

contended that, whenever the policy does contain this clause, such expenses, if necessarily incurred, must be recoverable from the underwriter, in addition to a total loss, as having been incurred by his special authorization. Emerigon (*e*) and Boulay-Paty (*f*), however, maintained that the permissive clause could not have the effect of fixing the underwriters with so extensive a liability, nor of subjecting him to any loss beyond the amount which he had agreed to insure, and on which alone he had received premium. In this state of the authorities, the question came up for decision before the *Cour de Cassation, on the following state of facts: a French merchant and shipowner insured ship and cargo from the isles of France and Bourbon to a port of discharge in France: the ship having encountered considerable sea damage at the Isle of France, which had been there repaired, on getting into the English Channel, in her voyage home, was compelled to put into Dartmouth for further repairs, which were also done and paid for; after which she again proceeded on her voyage and was totally lost by stranding in St. Malo Roads: the assured, who had abandoned, claimed to recover, in addition to a total loss, the expense thus incurred for repairs: the Tribunal of Commerce at Rochelle (17th April, 1819) and the Cour Royale of Poitiers (8th Feb. 1820) successively allowed his claim: but the Cour de Cassation, after a very long and interesting argument, finally rejected it, on the ground laid down by Emerigon and Boulay-Paty. (*g*)

Recovery of more than the amount of the insurance.

But it is now settled by the Cour de Cassation, that no expenses for repair of previous sea-damage can be recovered in addition to a total loss.

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SECT. IX. *Of the Adjustment of Salvage Losses.*

§ 414. In cases of abandonment, the assured, as we have seen, is entitled to the whole amount of the insurance, and the underwriter, on payment of such amount, is entitled to the net proceeds of whatever may be saved, — in other words, to the salvage, after deducting the expenses of saving and

Of the adjustment of salvage losses.

Mode of adjusting salvage losses with and without abandonment.

(*e*) Chap. xvii. sect. 8, vol. ii. pp. 238–245, ed. 1827.

(*f*) Cours de Droit Comm. Mar. tom. iv. pp. 272–276, 519–532.

(*g*) Case of *Kermel v. Royal Ass.*

Comp. cited at length by Boulay-Paty, Cours de Droit Com. Mar. tom. iv. pp.

519–532. The case is very interesting,

and well deserves a perusal by English lawyers.

Of the adjustment of salvage losses.

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recovering it. We have also seen that, even where no abandonment has been made, he is equally, on payment of a total loss, entitled to the net salvage that may ultimately come to hand. In the first case, the loss is frequently called *a salvage loss with*, and in the latter, *a salvage loss without, abandonment*. The only difference between the two cases is, that, in the former, the underwriters generally at once *pay the whole amount insured, and the salvage is thereupon transferred to them, and its net proceeds divided amongst them, in proportion to their several interests, in the manner already stated; in the latter case, the underwriters usually agree, in the first instance, to a payment on account, of a sum which is calculated as the probable difference between the amount insured and the net value of the salvage: should this amount prove less than the real difference, they pay the balance of the loss after it is finally settled; if more, the assured repays the excess. (h)

Loss on goods sold sea-damaged at any port except that of their destination, is generally adjusted as a salvage loss.

This mode of adjustment is, generally speaking, only adapted to cases of total loss, either constructive or absolute; there is, however, one case of partial or average loss to which, in practice, it is frequently and properly applied — and that is, where, by the perils of the sea, the ship is disabled and prevented from proceeding on her voyage *at some place short of her port of destination*, and the cargo, or that part of it which is saved, in order to prevent further deterioration, is obliged to be sold at the place of the disaster: in such cases the loss is, in practice, almost always adjusted as a salvage loss, *i. e.* each underwriter either at once pays the whole amount of his subscription, and takes his proportionate share of the net proceeds of the sale, after deducting all necessary expenses; or he pays the difference between such share and the amount by him subscribed. (i) In one case, where a ship, with a cargo of indigo just loaded on board, was upset and sunk in *her port of loading*, and the indigoes, having been got out of her, were sold by auction there, at a loss of 71 per cent. on their cost price on board, the court held that the true principle of adjustment was to settle this as a total

Hardy v. Innes, 6 Moore, 574.

(h) For example, see *Gammon v. Beverley*, 1 Moore, 563. 8 Taunt. 119. *Russell v. Dunakey*, 6 Moore, 283.

(i) *Stevens on Average*, 79-81, 5th ed. *Benecké, Fr. of Indem.* 442-447.

loss, with benefit of salvage, *i. e.* to calculate the loss according to the difference between the invoice price of the indigo at its *port of loading* and the sum it fetched as sold *there in its damaged state; and the loss having been adjusted by an arbitrator on this principle, the court refused to set aside his award, although it appeared that the indigo, after the sale, had been dried and sent on by other ships to London (its port of destination,) where it realized nearly as much as though it had received no injury whatever. (*j*)

Of the adjustment of salvage losses.

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{ SECT. X. *Of the Preliminary Proof.*

The American marine policies generally contain a provision, that a loss shall be paid in thirty, sixty, ninety, or some other number of days, *after proof of the loss*. This provision has given rise to what is termed, in our law, *the preliminary proofs*. The act of abandonment, under the general law of insurance, and the furnishing of the preliminary proofs, under the special stipulation in the policy, are distinct acts, and must not be confounded.¹ The object of this provision is only to furnish reasonable information to the insurer, so that he may be able to form some estimate of his rights and duties, before he is obliged to pay. It has always been liberally expounded, and is construed to require only the best evidence of the fact that the party possesses at the time.² "The *sufficiency* of the preliminary proof, is always a question of law, to be determined by the judge at the trial."³ Still in order to sustain an action for a loss it is necessary that some preliminary proof should be exhibited, unless it has been waived.⁴ It is not necessary that this preliminary proof should be furnished at the time of making an abandonment.⁵

Of the preliminary proof.

Object of the provision respecting preliminary proof and mode of expounding it.

(*j*) *Hardy v. Innes*, 6 Moore, 574.

¹ Per Kent, Ch. J. in *Barker v. Phoenix Ins. Co.* 8 John. 317, 318.

² Per Kent, Ch. J. in *Barker v. Phoenix Ins. Co.* 8 John. 317, 318; *Talcot v. Marine Ins. Co.* 2 John. 130; *Haff v. Marine Ins. Co.* 4 John. 132; *Lawrence v. Ocean Ins. Co.* 11 John. 239; *Rankin v. Amer. Ins. Co.* 1 Hall, 631.

³ Per Oakley, J. in *Rankin v. Amer. Ins. Co.* 1 Hall, 631, 632.

⁴ *Allegre v. Maryland Ins. Co.* 6 Harr. & John. 408.

⁵ *Barker v. Phoenix Ins. Co.* 8 John. 307.

Of the preliminary proof.

Proofs ordinarily exhibited to show interest and loss.

Ordinarily the proofs to be exhibited in case of loss, to show the interest of the assured, are the bills of lading, and invoice, or such other equivalent proof, as the nature of the case admits of, that being the kind of proof required.¹ The survey of the vessel or cargo, the protests, consular certificates, letters of the captain or other correspondents, &c. are the ordinary proofs to show that a loss has taken place.² Preliminary proof of interest is sometimes made by the affidavits of the parties claiming for the loss.³

In *Talcot v. Marine Ins. Co.*⁴ the policy contained a provision that the loss was to be paid in thirty days after proof thereof. The court said, — “It is sufficient to exhibit to the insurer, the usual documentary evidence, and so it was decided by this court in the case of *Lenox v. The United Ins. Co.* That was the case of an insurance upon goods, and the policy contained such a clause as the above, and the assured exhibited to the underwriters a customary protest, showing his loss, and a bill of lading and invoice, showing his interest, and this was held to be sufficient. The question in that case did not arise, whether the protest, as evidence of loss, would have been sufficient *without* the other documents, as evidence of interest. Proof of loss of a vessel does not imply proof of the owner’s title. It would be violence to push the construction of those words to that extent.”⁵

Where the vessel had been captured, and the master had been made prisoner, and the assured, on being informed of the loss by the pilot, who was present at the capture, communicated his information to the underwriters; Mr. Chief Justice Parsons said, in giving the opinion of the court; — “In this case it is our opinion that the evidence of the loss exhibited was sufficient. Nothing can be objected against it, but the want of the affidavit of the pilot, which it is not usual to send; and which he is not obliged by law to make. The

¹ *Allegre v. Maryland Ins. Co.* 6 Harr. & John. 408; *Talcot v. Marine Ins. Co.* 2 John. 130, 136.

² See *Barker v. Phoenix Ins. Co.* 8 John. 307; 2 Phil. Ins. 511; *Craig v. Un. Ins. Co.* 6 John. 226; *Talcot v. Marine Ins. Co.* 2 John. 130; *Vos v. Robinson*, 9 John. 192; *Lovering v. Mercantile Marine Ins. Co.* 12 Pick. 359, 360.

³ *Craig v. United Ins. Co.* 6 John. 226.

⁴ 2 John. 130.

⁵ See *Lenox v. United Ins. Co.* 3 John. Cas. 224.

master was a prisoner, and could make no protest, which is the usual evidence, when it can be obtained." ¹

Of the preliminary proof.

In a case, where it was agreed by the policy, "that if the vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage, on account of her being unsound or rotten, then the insurers shall not be bound to pay their subscription," a loss occurred, during the voyage, and the vessel was surveyed and condemned. The insurers required the assured to produce the survey which had been made upon the vessel; but the assured did not produce it. Thompson, J. delivering the opinion of the court said:—"Good faith and the true spirit and intention of the clause, requiring preliminary proof of loss, required the plaintiff to disclose, at least all the documentary evidence in his possession, touching the nature and extent of the loss. The survey must have been a material document to the insurers, in forming their judgment, whether the loss claimed was really total, because it is the opinion of competent judges, formed upon the spot, as to the state and condition of the vessel, and the extent of the requisite repairs. No good reason appears for withholding it in the present instance. The very fact of not producing it was calculated to awaken suspicion. We are, accordingly, of opinion, that the plaintiff was bound to produce it, or give some account of its non-production, and that he ought accordingly to have been nonsuited upon the trial." ²

Survey called for by insurers but not produced.

The insurers may by their language or acts waive the production of, or defects in, the preliminary proof. Thus in a case where, upon the assured making claim for a loss, the insurers answered that they "would not settle the claim in any way." Sutherland, J. delivering the opinion of the court said;—"The defendants waived whatever imperfection there may have been in the preliminary proofs of the plaintiff's interest in the subject insured, by not putting their refusal to pay upon that ground. They declared that they 'would not settle the claim in any way;' putting their

Waiver of the production of the preliminary proof.

¹ *Munson v. New Eng. Mar. Ins. Co.* 4 Mass. 88, 90.

² *Haff v. Marine Ins. Co.* 4 John. 132, 135, 136.

Of the preliminary proof.

objection to pay on the merits of the case, and not on any defect in the proof of the plaintiff's interest. If that ground had been taken, the defect might, and undoubtedly would have been supplied."¹

Where the assured gave notice of a claim for the loss of a vessel which had been condemned, and the insurers at first demanded the captain's protest, and after some correspondence gave notice to the assured, that, "they did not consider themselves answerable for the claim," this was held to be a waiver of all objection to the preliminary proofs offered by the insured.²

So in another case, in an action upon a policy of insurance on a vessel, no evidence was offered of any preliminary proof being exhibited to the insurers before the action was brought, except an abandonment, a demand of payment, and an agreement of the parties to refer the case to arbitrators; it appeared, however, that the insurers had always refused to pay, on the ground of the unseaworthiness of the vessel, and not on account of the want of further preliminary proof. Putnam, J. said: — "The court very properly left it to the jury to determine whether the defendants had not waived their right to any further proof, or whether it was not evidence, that they had such proof. We all think that direction was right, and are satisfied with the result expressed by the opinion of the jury, for the plaintiff, as to that part of the case."³ }

¹ *Francis v. Ocean Ins. Co.* 6 Cowen, 404, 415; *S. C.* 2 Wendell, 64. See also, to the same effect, *Vos v. Robinson*, 9 John. 192; *Allegre v. Maryland Ins. Co.* 6 Harr. & John. 404; *Johnston v. Col. Ins. Co.* 7 John. 315; *Lawrence v. Ocean Ins. Co.* 11 John. 241; *Heath v. Franklin Ins. Co.* 1 Cushing, 257.

² *Ins. Co. v. Bathurst*, 5 Gill & John. 159.

³ *Martin v. Fishing Ins. Co.* 20 Pick. 399, 396. See also, *Heath v. Franklin Ins. Co.* 1 Cushing, 257; *M'Intire v. Bowne*, 1 John. 229.

*CHAP. X.

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ADJUSTMENT OF THE POLICY — ITS EFFECT AS AN
ADMISSION OF LIABILITY.

§ 415. WHEN the amount of indemnity which the assured is entitled to receive, and the proportion of such amount which each underwriter is liable to pay on the sum by him subscribed, has been settled and ascertained, (in the mode already indicated in treating of the adjustment of average and salvage losses,) an indorsement is made on the policy, generally in the following, or some similar form: — “*Adjusted the loss on this policy at £—— per cent.*” The policy thus indorsed is then taken round by the broker to the different underwriters, who respectively affix their initials to the memorandum, and very frequently, at the same time, strike a pen through their subscription at the foot of the policy. (a) The policy thus indorsed is said to be adjusted: the loss, however, is not then paid; but, by the general usage of the trade, is understood to be payable at a month or six weeks from that date: at the end of that period the amount is entered to the debit of the underwriter in the broker’s books, a pen is drawn through his initials affixed to the memorandum of adjustment, and the loss is then said to be *struck off*, or settled in account; although, *as between the broker and underwriter*, it is frequently the case that no money even then passes between them, but the amount is merely carried to the creditor and debtor side of their mutual accounts, the general balance of which is made up at the end of every current year; and the excess of all the *losses in the account (if any) over the sums due for premiums in the same account, is either then paid by the underwriter or suffered to

Adjustment of the policy — its effect as an admission of liability.

What is meant by an adjustment of the policy.

Striking off losses.

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(a) Sometimes, instead of being indorsed on the policy, the memorandum is written at the foot of the policy against the subscription of the underwriter. *Adams v. Saunders*, 4 C. & P. 25.

Adjustment of the policy — its effect as an admission of liability.

A loss struck off an adjusted policy is finally settled as between the broker and underwriter.

But not as between the underwriter and the assured, unless the latter be a consenting party or cognizant of the usage of Lloyd's.

Erasure of the underwriter's subscription from the policy, is no proof of payment, only of settlement on account.

Effect of adjustment as an admission of underwriter's liability: rule derivable from the cases.

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run on as an item to his debit in the next year's account: if the balance is the other way, or in favor of the underwriter, the same course is observed, *mutatis mutandis*: as between *the broker and the underwriter*, directly the amount of the loss is entered to his debit in the broker's books, and his initials struck off the memorandum of adjustment, the account is finally settled, as far as regards the particular policy so adjusted (*b*): as between the *underwriter and the assured*, however, such adjustment, even where both the subscription of the underwriter to the policy, and also his initials affixed to the memorandum of adjustment, have been struck out, is no bar to an action by the assured on the policy, unless, indeed, it can be shown either that the assured expressly consented to their being struck out, or from his place of residence, general habits of effecting insurances at Lloyd's, and other material circumstances, must be taken to have been cognizant of a usage to regard such settlement on account as payment, and therefore impliedly to have given his consent to be bound by the adjustment, as conclusive of his claims under the policy. (*c*) Even in such cases, the mere erasure from the foot of the policy of *the defendant's subscription*, (as distinct from *his initials affixed to the memorandum of adjustment*), is no proof of payment, but only of settlement on account; the general practice being, as we have just seen, to strike out the signature to the policy without any money passing at the time, on the faith of a future settlement at the month's end. (*d*)

§ 416. It was formerly a litigated question, to what extent an adjustment thus indorsed on the policy operated as an admission of the underwriter's liability: it may now, however, be taken, as the fair result of the authorities, that an adjustment is nothing more than a promise to pay, which is only binding when founded on the consideration of previous liability, and, that although *prima facie* it imports consideration, yet an underwriter who has merely put his initials to it, but not paid the loss, may avail himself, at the trial, of any

(*b*) See *ante*, Part I. Chap. V. Art 1, v. Maitland, 1 Gow's C. 205. Scott v. vol. i. pp. 109-112. and Art 3, vol. i. pp. Irving, 1 B. & Ad. 605. Reynier v. Hall, 126-129. 4 Taunt. 724.

(*c*) See *ante*, Part I. Chap. V. Art 4, (*d*) Adams v. Saunders, 4 C. & P. 25. pp. 129-136; and see especially Benson M. & Malk. 373.

defence tending to show that he was never liable under the policy, and this, although he may have been aware of all the facts constituting such defence at the time of signing the adjustment.

Adjustment of the policy—its effect as an admission of liability.

The earliest reported case on the subject came before Chief J. Lee: the indorsement on the policy was as follows:—*“Adjusted the loss on this policy at 98l. per cent., which I agree to pay one month after date:”* the Chief Justice was of opinion that an adjustment *in this form* was to be considered as a *note of hand*, and that plaintiff need not enter into proof of loss. (e) And it was afterwards ruled, by Lord Kenyon, that such adjustment may be given in evidence without a stamp (f); though without a stamp it could not, it seems, be sued on as a promissory instrument. (g)

Adjustment with a promise to pay, is to be considered as a *note of hand*.

As to stamp.

Lord Kenyon, in all the cases of the kind that came before him at Nisi Prius, uniformly ruled that an adjustment was not conclusive where it could be shown to have been made under any misconception of the law, or the fact. (h)¹ Thus, in one of these cases, he refused to hold an adjustment conclusive where the same witness who proved the defendant's signature to the adjustment proved also that, soon after signing it, doubts had arisen in the mind of the underwriters as to the honesty of the transaction, and that they had called for further proof; and the plaintiff, who, at the trial, relied on the adjustment alone for the proof of his case, was nonsuited. (i) *In another case, his lordship ruled the same point, even though it appeared that, before signing the adjustment, the underwriter had perused all the documents and papers re-

Cases before Lord Kenyon as to the effect of an adjustment as an admission. De Garron v. Galbraith, Peake's Add. Cases, 37.

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(e) Hogg v. Gouldney, Beawes, 310. Park on Ins. 266, 8th ed. Marshall on Ins. 642. See S. P. Hewitt v. Flexney, Beawes, 306.

(f) Wiebe v. Simpson, Selw. N. P. 965, 9th ed.

(g) Per Lord Ellenborough, 1 Camp. 136.

(h) Rogers v. Maylor, Park on Ins. 267, 8th ed. Marshall, 644. De Garron v. Galbraith, Park on Ins. 267, 8th ed.; and also Peake's Add. Cases, 37.

Christian v. Coombe, 2 Esp. 489.

(i) De Garron v. Galbraith, Park on

Ins. 267. Peake's Add. Cases, 37.

¹ In Dow v. Smith, 1 Caines, 32, on an application to set aside an adjustment, the court in New York said, "It appears that, previous to the adjustment, all the facts were communicated to the underwriters. The adjustment was made by the underwriters with their eyes open. An adjustment cannot be opened, except on the ground either of fraud, or mistake, from facts not known." See Faughier v. Hallett, 2 John. Cas. 233.

Adjustment of the policy — its effect as an admission of liability.

Christian v. Coombe, 2 Esp. 489.

Cases before Lord Ellenborough. Sheriff v. Potts, 5 Esp. 95.

Herbert v. Champion, 1 Camp. 133. Until an underwriter has actually paid a loss, he may, notwithstanding the adjustment of the policy, avail himself of any defence *in fact*, or *in law*.

Shepherd v. Chewter, 1 Camp. 274. An adjustment is not binding on the underwriter, although at the time of signing it he had full means of knowing all the facts, *unless they were all blazoned to him as they really existed*.

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lating to the loss which were, *at that time*, in the possession of the assured, but had not seen another material piece of evidence which came to hand *after the adjustment* took place. (j)

Lord Ellenborough carried out to the full, if, indeed, he did not extend, the same doctrine. Thus, in the first case of the kind which came before him, he allowed the defendants, notwithstanding the adjustment, to go into proof of a deviation in the course of the voyage, which being established, he nonsuited the plaintiff (k): in the next case of the same kind, his lordship allowed proof to be gone into of a material concealment at the time of effecting the policy, although it appeared that, just before putting his initials to the adjustment, the defendant had read letters from the captain giving a full account of all the circumstances of the loss (l): in charging the jury on this occasion, the Chief Justice drew a broad distinction between cases where, upon a dispute, *the money is paid*, and those in which *there is only a promise to pay*: "if the money *has been paid* it cannot be recovered back without proof of fraud; *but a promise to pay will not in general be binding unless founded on a previous liability*. What is an adjustment? *An admission, on the supposition of the truth of certain facts stated, that the assured are entitled to recover on the policy*. An underwriter must make a strong case after admitting his liability; but, until he has paid the money, *he is at liberty to avail himself of any defence which the facts or the law of the case will furnish*." (m)

In the next case, Lord Ellenborough established the position, that an adjustment is not binding on the underwriter, although, at the time of signing it, he had full means of rendering himself acquainted with the history of the voyage, and the manner of the loss, if his attention was not *then peculiarly drawn to circumstances he afterwards learns, by which the underwriters are discharged. The facts of the case were shortly as follows: — Before signing the adjustment, the defendant had read a statement which was posted up at Lloyd's, to the effect that the ship had *chased every thing she saw*, and been subsequently captured, owing to the

(j) Christian v. Coombe, 2 Esp. 489.

(k) Sheriff v. Potts, 5 Esp. 95.

(l) Herbert v. Champion, 1 Camp. 133.

(m) 1 Camp. 136.

cowardice of the captain : in reference to this statement, the defendant remarked, on signing the adjustment, that, as the captain was killed, it was not likely the ship was lost by his cowardice. Lord Ellenborough, notwithstanding the adjustment, allowed the defendant, at the trial, to go into evidence of deviation by cruising, which, being proved, he had a verdict (n) : his lordship, on this occasion, told the jury that the adjustment could not be binding on the defendant *unless the whole circumstances of the case "were all blazoned to him as they really were,"* and he desired them to consider whether or not, at the time of the adjustment, his attention was drawn (as by the remark made by him at the time it seemed to have been) *only to the manner in which the ship was captured,* and was not *roused to the previous deviation,* with which he afterwards became acquainted. (o)

Adjustment of the policy — its effect as an admission of liability.

Lord Campbell, in a very able note to this case, intimates that, even had the previous deviation been brought fully before the defendant's notice, or, in the emphatic language of Lord Ellenborough, "*blazoned to him as it really was,*" the adjustment would still not have precluded him from availing himself of the deviation as a defence to the action : the ground of his opinion being the principle laid down by Lord Ellenborough in *Herbert v. Champion*, that the underwriter, at any time *before paying the loss*, may take advantage of whatever grounds of defence his case offers, *although he was actually aware of them when he signed the adjustment* : reasoning also from general principles of law, he remarks that although an adjustment may, *prima facie*, import consideration, yet it is not easy to imagine how the defendant should, *in any case, be debarred from showing that, in fact, it was entirely without consideration, *or how greater efficacy can be given to it than merely to transfer the burthen of proof from the assured to the underwriter.* (p)

Seemingly, the only effect of an adjustment is to shift the burden of proof from the assured to the underwriter.

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§ 417. The case is otherwise where, besides signing the adjustment, the defendant has *actually paid the loss* : in such

It is different where loss has actually been

(n) *Shepherd v. Chewter*, 1 Camp. 274.

(o) *Ibid.* 275.

(p) 1 Camp. 275, note. See also *Selw.* N. P. 996, 9th ed. Such seems to have

been admitted to be the law in the two subsequent cases of *Steel v. Lacy*, 3 Taunt. 285. *Reynier v. Hall*, 4 Taunt. 725.

Adjustment of the policy — its effect as an admission of liability.

paid; in such case, if paid with full knowledge or means of knowledge of the facts, it cannot be recovered back.

Bilbie v. Lumley,
2 East, 469.

After policy adjusted, and return of premium paid, the assured cannot again resort to the underwriter on the policy. *May v. Christie*, Holt's N. P. 67. But return of premium paid under a mistake of fact, may be recovered back. *Reynier v. Hall*, 4 Taunt. 795.

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Subsequent recovery of thing insured undamaged, after payment of a total loss, will not entitle the un-

cases, if the payment have been made with full knowledge, or means of knowledge, of all the circumstances, though in ignorance of the law, the convenience of mankind requires that the party who has so paid it should be precluded from afterwards contesting his liability. Thus, where an underwriter, who had paid a total loss, claimed to recover it back on the ground that a material letter had not been disclosed to him *before effecting the policy*, but it appeared at the trial that, *before signing the adjustment and paying the loss*, all the papers had been laid before him, and, amongst the rest, the letter in question: the court held, that the money paid could not be recovered back, because it had been paid with full knowledge, or means of knowledge, of all the circumstances. (q)¹ So, where a policy had been adjusted for a return of premium, and the sum due in respect of such return had been actually paid, under full knowledge of all the circumstances, it was held that the assured could not again resort to the underwriter on the policy (r): but where such return has been paid under a *mistake of fact* the case is different: thus, where a policy on a ship "warranted free of capture in port," was adjusted for a return of premium, and the premium was actually paid back on receipt of a letter stating the capture to have taken place in the port of discharge, but it afterwards turned out that this was a mistake, and that the capture had not taken place in the port of discharge within the meaning of the warranty: the court held that the assured was not precluded by the adjustment or repayment of the premium from recovering on the policy, though the underwriter's initials had been struck off from the indorsement, and his subscription from the face of the policy, for this must be regarded as the case of an instrument destroyed by mistake. (s)

As we have elsewhere seen, if a total loss has been adjusted and actually paid, the subsequent recovery of the thing in-

(q) Bilbie v. Lumley, 2 East, 469.

(r) May v. Christie, Holt's N. P. 67.

(s) Reynier v. Hall, 4 Taunt. 725; and the policy. See S. C.

fortiori, this would be so where only the

initials were struck off the adjustment, and the subscription left on the face of

¹ See *Elting v. Scott*, 2 John. 157; *Dow v. Smith*, 1 Caines, 32; *Chitty*, Cont. (8th Amer. ed.) 543, 544, note.

sured undamaged, and only charged with a trifling sum as the expenses of its recovery, will not entitle the underwriter to recover back the money he has so paid; for the loss was total at the time of the adjustment, and the money was paid under no misapprehension of the state of the facts as they then existed (*t*): in such case, however, the underwriter, even without abandonment, will be entitled to the salvage, after deducting the expenses of its recovery (*u*); unless, indeed, he have waived his right thereto, as by declining an offer to abandon and inducing the assured to take less than a total loss, on condition of his (the underwriter) renouncing all benefit of future salvage. (*v*)

If the underwriter have adjusted and paid a certain percentage on his subscription, as for a total loss, with benefit of salvage, at a time when the circumstances of the case were such as to amount to a constructive total loss, as in case of capture and confiscation of goods, he will not be allowed to recover back any part of the money so paid, because, ultimately, part of the proceeds of the property are restored to the assured, under such circumstances of increased value, that the amount so received, added to the money paid by the underwriter on the adjustment, together exceeds the whole amount of the insurance. (*w*)

*Generally speaking, the assured need not sue specially on the adjustment (*x*),¹ although there seems no doubt that, if properly stamped, he might do so. (*y*)

If, however, the adjustment be conditional in its terms, and the plaintiff seek to recover upon it, it should seem that he must declare upon it specially: thus, where an indorsement was made on the policy to the following effect:—
“Adjusted 33 per cent., on account, on my subscription to

Adjustment of the policy — its effect as an admission of liability.

derwriter to recover it back. *Da Costa v. Frith*, 4 Burr. 1966.

But in such case he will be entitled to the salvage, unless he have waived his right to it.

Sums paid as part of total loss, cannot be recovered back, because so much of the property is ultimately restored as to exceed together with the sums so paid, the whole amount of the insurance.

Tunno v. Edwards, 12 East, 488.

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The adjustment need not, generally, be declared on specially, though, if properly stamped, it may be so, *semble*.

(*t*) *Da Costa v. Frith*, 4 Burr. 1966.

(*u*) *Ibid*.

(*v*) *Blauwpot v. Da Costa*, 1 Eden 130. *Brooks v. McDonnell*, 1 Young & C. 500.

(*w*) *Tunno v. Edwards*, 12 East, 488. *Goldamid v. Gillies*, 4 Taunt. 803.

(*x*) *Per Lord Kenyon in Rogers v. Maylor*, Park on Ins. 267.

(*y*) *Per Lord Ellenborough in Herbert v. Champion*, 1 Camp. 136.

¹ Where a statement of a loss is made up by a despacheur, and presented to the underwriters, and they refuse to settle in conformity to it, the assured is not thereby precluded from claiming a greater amount than is allowed to him in such statement. *Amer. Ins. Co. v. Griswold*, 14 Wendell, 399.

Adjustment of the policy — its effect as an admission of liability.

If, however, it be conditional in its terms, no recovery can be had without showing the condition complied with : *semble*, in such case the declaration should be special.
Gammon v. Beverley,
 1 Moore, 563.

Parol evidence admissible to show that an adjustment was conditional.
Russel v. Dunskey,
 6 Moore, 233.

At common law no interest could be given on an adjustment to pay in a certain time.
 3 & 4 W. 4.
 c. 42. ss. 28, 29.

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this policy, until the account of the proceeds of the goods can be made up, when a final loss is to be paid to the same amount as by the other underwriters : if the same exceed 33 per cent., B. (the underwriter) to pay the excess ; if short, H. (the assured) to pay the difference : ” the court held that this was clearly a conditional adjustment, in respect of which the plaintiff could not recover, without showing, at all events, that they had made up and delivered an account of the proceeds. (z) In the same case, the court also held, what, indeed, appears too clear to admit of a moment’s doubt, that the adjustment of the policy for a larger amount (64 per cent.) by the other underwriters, could not bind the defendant. (a)

Although an adjustment may, on the face of it, appear absolute, parol evidence is admissible to show that, by *previous agreement*, it was to be regarded as conditional.

Thus, where the policy had indorsed on it this memorandum — “ Settled a particular average loss, by plunder, of 54l. 10s. 11d. per cent.,” the court held parol evidence admissible, to show that, by a previous arrangement, it was verbally agreed, between plaintiff and defendant, that if the other underwriters paid a less sum, the surplus should be repaid. (b)

At common law, an adjustment to pay in a certain time (as “ adjusted a loss of —l. per cent. on this policy, payable *in a month ”) did not entitle the assured to interest from the expiration of that time. (c) Now, however, it should seem that interest would be recoverable on the sum specified in such an adjustment, under the 3 & 4 W. 4, c. 42, s. 28, as upon a debt or sum certain, payable by virtue of a written instrument at a certain time ; or else, at all events, the case would come within the twenty-ninth clause, allowing the jury to give *damages, in the nature of interest*, in all actions on policies of assurance made after the passing of the act. (d)

(a) *Gammon v. Beverley*, 1 Moore, 573. 8 Taunt. 119.

(a) *Ibid.*

(b) *Russell v. Dunskey*, 6 Moore, 233.

(c) *Hubbard v. Jackson*, Marshall on Ins. 647.

(d) 3 & 4 W. 4, c. 42, ss. 28, 29.

*CHAP. XI.

*1210

OF RETURN OF PREMIUM.

§ 418. WHENEVER one man receives a sum of money from another upon a consideration which from any cause, except the fraud of the party paying it, happens wholly to fail, or is, in fact, never performed, he is under a clear obligation, from the rules of natural equity, to refund it.

Of return of premium.

Principles on which all claims to return of premium are founded.

Now, the premium is a sum of money paid by the assured to the underwriter in consideration of his taking upon himself *a risk*; the risk, namely, of having to indemnify the assured from any loss that may be sustained in the course of a sea-venture.

Risk, therefore, assumed by the underwriter on the one side, and the premium paid by the assured as the price of that risk on the other, are, in the language of Mr. Marshall, "correlatives, whose mutual operation constitutes the essence of the contract of insurance." (a)

Hence, as Lord Mansfield expresses it, "There are two general rules established applicable to this question: the *first* is, *that where the risk has not been begun*, whether this be owing to the fault, pleasure, or will, of the assured, or any other cause, the premium shall be returned; because a policy of insurance is a contract of indemnity: *the underwriter receives a premium for running the risk of indemnifying the assured; and, to whatever cause it may be owing, if he do not in fact run the risk, the consideration for which the premium was put into his hands fails, and therefore he ought to return it.*" (b) ¹

Where the risk has not been begun, the premium is returned.

(a) Marshall on Ins. 648.

(b) Per Lord Mansfield in Tyrie v. Fletcher, Cowp. 666.

¹ See Graves v. Mar. Ins. Co. 2 Caines, 339; Forbes v. Church, 3 John. 159; Lawrence v. Ocean Ins. Co. 11 John. 262; Marine Ins. Co. of Alex. v. Tucker, 3 Cranch, 385.

Of return of premium.

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But where an entire risk has once commenced, no proportionable return is to be made.

Another rule is, that if an entire risk has once commenced, there shall be no apportionment or return of premium afterwards; for though the premium is estimated and the risk depends on the nature and length of the voyage, yet, if it was commenced, though it be only for twenty-four hours, or less, the risk is run; the contract is for the entire risk, and no part of the consideration shall be returned. (b) ¹

Upon these two principles the solution of every question relating to Return of Premium ultimately depends. In the application, however, of these principles much nicety of discrimination has been shown by the English courts, especially in determining whether, in the particular case, there has been an inception of an entire risk under the policy, or whether the risk insured, and, consequently, the premium, is apportionable.

With a view to greater clearness, we will consider the subject under the following heads:—

Sect. I. Return of premium where the risk has never commenced.

Sect. II. Return of premium where the contract is avoided by illegality or fraud.

Sect. III. Return of premium for want of interest, and in cases of short interest and over-insurance.

Sect. IV. Return of premium under express stipulations.

Sect. V. Deduction of one half per cent.

Sect. VI. Practice as to paying premium into court.

SECT. I. *Return of Premium where Risk has never commenced.*

Return of premium — where risk has never commenced.

Where, from any cause, except the actual fraud of the assured, the risk has never commenced, the premium shall be returned.

§ 419. It follows directly from the principles already laid down, that where the risk has never had an inception, from whatever cause this may arise, except from the actual fraud

(b) Per Lord Mansfield, Cowp. 666.

¹ See *Hendricks v. Commercial Ins. Co.* 8 John. 1; *Mar. Ins. Co. of Alex. v. Tucker*, 3 Cranch, 357; *Steinback v. Col. Ins. Co.* 2 Caines, 129; *Taylor v. Lowell*, 3 Mass. 343; *Col. Ins. Co. v. Lynch*, 11 John. 233; *Merchants Ins. Co. v. Clapp*, 11 Pick. 57.

of the assured, the premium shall be returned,¹ the rule being that, where no risk is run, the premium, which is the price of the risk, shall not be retained; although the non-inception of the risk may be owing to the neglect or fault of the assured, the rule is still the same; nothing but his actual fraud can *disentitle him to a return of premium, where no risk has, in fact, been run. The general law maritime agrees with our own on this point, and is based on the same principles. (c)

Return of premium — where risk has never commenced — ratable return.

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In the following cases, the inquiry has been whether the policy did or did not comprise several distinct risks, and the object has been to apportion the return of premium, with reference to such of those risks as may not have been commenced.²

Apportionable return of premium.

The first reported case of the kind was that of *Stevenson v. Snow*, before Lord Mansfield, in which it appeared that a ship was insured, "lost or not lost, at and from London to Halifax, warranted to depart with convoy from Portsmouth for the voyage." Before the ship reached Portsmouth, the convoy was gone. Notice of this was immediately given to the underwriters, who were requested either to make the long insurance, or to return part of the premium. On their refusal the action was brought to recover back a proportionable part of the premium for the voyage from *Portsmouth* to *Halifax*. The jury at the trial having found that it was usual for the underwriters in such cases to return part of the premium, though the quantum was uncertain, the court held that the

A ship, insured from London to Halifax, with warranty to sail with convoy from Portsmouth, on arriving at Portsmouth finds the convoy gone, and never sails on the long voyage: premium apportioned. *Stevenson v. Snow*, 3 Burr. 1237.

(c) See Emerigon, chap. xvi. sect. 1, liv. 3, tit. vi. des Assurances, art. 37. vol. ii. p. 186, ed. 1827, where, as usual, Code de Commerce, art. 349. See also all the learning that could be collected on Boulay-Paty, Cours de Droit Comm. tom. the subject is methodically arranged: for iv. p. 6, ed. 1834. the French law, see Ord. de la Marine,

¹ It is a well established rule of the law of insurance, that if the vessel is unseaworthy at the time the risk would commence, the policy does not attach, and no premium is due; and if a premium note has been given, the consideration fails, and it cannot be recovered. *Commonwealth Ins. Co. v. Whitney*, 1 Metcalf, 21, 23; *Russell v. De Grand*, 15 Mass. 35; *Taylor v. Lowell*, 3 Mass. 331; *Merchants Ins. Co. v. Clapp*, 11 Pick. 56; *Porter v. Bussey*, 1 Mass. 435; *Penniman v. Tucker*, 11 Mass. 66; *Graves v. Marine Ins. Co.* 2 Caines, 339.

² Where a policy divides a voyage into distinct risks, affixing a separate premium for each, and after the first risk the vessel is destroyed by fraud of the assured, whereby the other risks are not incurred, the assured may recover the premium paid for such other risks. *Waters v. Allen*, 5 Hill, 421.

Return of premium — where risk has never commenced — ratable return.

Lord Mansfield's explanation of this case.

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Where no usage to that effect is proved, no proportionable return of premium can be made.

Meyer v. Gregson,
3 Dougl. 402.

assured was entitled to a ratable return of premium for the voyage from Portsmouth to Halifax. (d)

Lord Mansfield, on referring to this case on two subsequent occasions, said the decision depended on this, "*that there was a contingency specified in the policy, upon the not happening of which the insurance would cease,*" (e) — "the intention of the parties," he said, "the nature of the contract, the consequences of it, spoke manifestly *two* insurances, and a *division* between them. The first object of the insurance was from *London* to *Halifax*; but if the ship *did not depart from Portsmouth with the convoy specified, then there was to be no contract from Portsmouth to Halifax. The parties then have said, "*We make a contract from London to Halifax; but on a certain contingency it shall only be a contract from London to Portsmouth:*" *that contingency happening, reduces it, in fact, to a contract from London to Portsmouth only.* The whole argument turned on that distinction; and all the judges, in delivering their opinions, lay the stress upon the contract comprising *two distinct conditions*, and considering the voyage as being, in fact, *two voyages.* (f) His Lordship also said that, although the evidence of usage was rejected as to the *amount* of the return, (being uncertain *as to that point,*) yet it weighed with the court, "*as showing the general sense of merchants as to the propriety of a return being made.*" (g)

In the next case of the same kind a ship was insured "*at and from Jamaica to Liverpool, warranted to sail on or before the first of August,*" &c.: the ship did not sail till the first of September; and, by this breach of warranty, there never was an inception of the risk by the ship's sailing from Jamaica: the assured, however, contended that the risk was divisible, and had attached upon the ship while she lay in port at Jamaica before the first of August: *he, however, gave no proof of a usage of trade to consider such risks divisible, or to make a ratable return of premium for the risk at the island:* under these circumstances, the court held there could be no apportionment; and Mr. J. Buller said, "*In all insurances from Jamaica, the policy runs 'at and from;'*" and

(d) *Stevenson v. Snow*, 3 Burr. 1237.

1 W. Bl. 318.

(e) Dougl. 789.

(f) Cowp. 669.

(g) Ibid.

though in many instances the *voyage* has not been commenced, yet there never was an idea of any part of the premium being returned, and *no usage to do so has been found by the jury.*" (h)

Return of premium — where risk has never commenced — ratable return.

In a subsequent case, Mr. J. Buller rests this decision solely on the ground that no usage was found (i); and it is *plain that on no other basis can it be reconciled with the two

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A ship was insured "at and from any port of ports in Jamaica to London, following and commencing from her first arrival there; warranted to sail with convoy for the voyage from the place of rendezvous:" the ship did not sail with convoy from the rendezvous; so that the warranty was broken, and the underwriters were off the risk, at all events from the time of sailing; but *some evidence being given of a usage* in such cases to apportion the premium, the jury thought that one half per cent. for the risk in port at Jamaica should be retained, and the residue for the risk from Jamaica to London be returned: Lord Mansfield was of the same opinion, remarking, "That wherever there is a *contingency* in the voyage, the risk may be divided, and that the reason why, in such cases, there are not two policies, is that the risk 'at' is capable of exact computation." (j)

But where, in a policy at and from, a contingency is introduced; as by a warranty to sail with convoy, &c. — then, if a usage is shown to consider the risk divisible, there will be a proportionable return of premium. *Gale v. Machell, Park on Ins. 797; Marsh. on Ins. 667.*

The next case was as follows: goods were insured "at" and from Jamaica to London, warranted to depart with convoy for the voyage, and to sail on or before the first of August, &c. The ship sailed before the first, but without convoy; the assured brought his action for a proportionable return of premium in respect of the voyage from Jamaica to London: the jury found for the plaintiff, and also found specially "that it was the constant and *invariable usage* in insurances at and from Jamaica to London, warranted to depart with convoy, or to sail on or before a certain day, to return the premium, deducting one half per cent. if the ship sailed without convoy, or after the day prescribed."

Long v. Allen, 4 Dougl. 276, S. P.

The court determined that the assured was entitled to recover according to the usage proved; and, with reference

(A) *Meyer v. Gregson*, 3 Dougl. 402. *Marshall on Ins. 669.* "In *Meyer v. Park on Ins. 796*, 8th ed. *Marshall on Gregson no usage was found.*" *Ins. 666.*

(j) *Gale v. Machell, Marshall on Ins.*

(i) In *Long v. Allen*, 4 Dougl. 278. 667. *Park on Ins. 797*, 8th ed.

Return of premium — where risk has never commenced — ratable return.

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to *distinct* risks insured by one policy, Lord Mansfield said, "My opinion has been to divide the risks. I am aware that there are great difficulties in the way of apportionments, and therefore the court has always leaned against them. *But* * *where an express usage is found by the jury, the difficulty is cured.*" (k)

Where, however, the risk is entire under the policy, and has once commenced, no return of premium can take place, no matter how short a time the risk may have lasted.

§ 420. Where, however, upon the true construction of the policy, the risk must be considered *as entire and indivisible*, then, if it has once commenced, there can be no return of premium.

The shortness of *the duration of the risk* has no bearing on the question of return of premium: the moment the risk commences the whole premium becomes the absolute property of the underwriter.

It is, in fact, quite impossible to apportion the premium with reference to the duration of the risk, which may be greater in the first hour, than in the whole of the rest of the voyage (l): in all cases, therefore, where the risk under the policy is entire, if the ship once get under weigh and sail on the voyage insured, the premium is acquired, though she may return the next instant and wholly abandon the voyage.

As in policies "at and from," though ship lost before loading. *Moses v. Pratt*, 3 Camp. 296.

So where the insurance is "*at and from*," and the risk under the policy entire, there can be no return of premium, though the ship may be lost while *at* the port waiting to take in a cargo. (m)

Or though ship may *sail* unseaworthy for the voyage. *Annan v. Woodman*, 3 Taunt. 299.

So where a ship insured "*at and from*" a port sailed from it on her voyage and was lost; and it appeared that though she was not seaworthy for the voyage when she sailed, she was yet sufficiently seaworthy for lying "*at*" the port: the court held, that, as the insurance was "*at and from*," the risk had commenced, and being entire, there could be no return of premium. (n)

No return of premium in cases of *deviation*.

Upon the same principle it is a familiar rule, that, as deviation does not *avoid* the policy *ab initio*, but only discharges

(k) *Long v. Allen*, 4 Dougl. 278. Park on Ins. 797, 8th ed. Marshall on Ins. 668. Mr. J. Buller also entirely rests the case on the ground of usage. See also *S. P. Rothwell v. Cooke*, 1 Bos. & Pull. 172; and see *Marshall on Ins.* 666, 299. note (a).

(l) *Marshall on Ins.* 669, and the authorities there cited; and see 2 Phillips on Ins. 534.

(m) *Moses v. Pratt*, 4 Camp. 296.

(n) *Annan v. Woodman*, 3 Taunt.

the underwriter from the time the ship leaves the *course of the voyage, the assured is not entitled to a return of premium in cases of deviation. (o)

Return of premium — where risk has never commenced — ratable return.

The only difficulty, then, is in ascertaining when the risk shall be regarded as entire and indivisible; and with regard to this an important test is its being insured *for one entire premium*.

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When the risk is to be regarded as entire.

Where the policy is on time, and the insurance for a specified term *at one entire premium*, there can be no doubt: in such cases if the risk have once commenced, though an event may happen *immediately afterwards* which determines the contract, there shall be no return of premium (p): and if a *gross sum* be given as premium, it makes no difference that it is expressed in the policy to be, *at so much per cent. per month*; for this shall be deemed only a mode of computing the gross sum, and does not make the contract a monthly insurance. (q)¹

Insurance on time at an entire premium is an entire risk.

Tyrie v.

Fletcher, Cowp. 666.

If premium be a *gross sum*, though payable at so much per cent. per month, risk may still be entire.

Lorraine v.

Thomlinson, 2 Dougl. 565.

Insurance, at an entire premium, of a round voyage consisting of several passages, is an entire risk.

Bernon v.

Woodbridge, Dougl. 781.

A ship was insured "at from Honfleur to the coast of Angola; during her stay and trade there, and at and from thence to her port or ports of discharge to St. Domingo, and at and from St. Domingo back again to Honfleur," *at a premium of eleven per cent.* The ship, in sailing from Angola to St. Domingo, was guilty of a deviation, which discharged the underwriters from that time, and was lost on her passage home from St. Domingo to Honfleur. The question was whether the assured were entitled to a return of premium in respect of the passage from St. Domingo to Honfleur; which they contended to be a separate voyage, the risk on which had never commenced owing to the prior deviation.

Lord Mansfield and the whole Court of King's Bench, however, considering that in this case *the premium was estimated at one entire sum for the whole*; and, also, (which his lordship thought extremely material as distinguishing the case from *Stevenson v. Snow, &c.*,) *that there was nowhere any contingency at any period, out or home, mentioned in the*

(o) Hogg v. Horner, Park on Ins. 782, (g) Lorraine v. Thomlinson, 2 Dougl. 8th ed. Tait v. Levi, 14 East, 481. 585. Marshall on Ins. 675.

(p) Tyrie v. Fletcher, Cowp. 666.

¹ See *Lovering v. Mercantile Mar. Ins. Co.* 12 Pick. 343.

Return of premium — where risk has never commenced — ratable return.

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**policy, which happening or not was to put an end to the insurance* — held that the whole was one entire risk, and, therefore, that, as it had once begun, the whole premium was due. (r)

The law is the same in the United States.

§ 421. The general result of all the above cases seems to be that *where no usage is proved to the contrary*, an entire premium cannot be divided and apportioned unless the risks are divided in the policy in such a manner as to show that the parties had distinct risks in contemplation; and the law, as to this point, seems to be the same in the United States. (s)

Law in France.

In France the law, as fixed by the 356th art. of the Code de Commerce, is, that, on an insurance on goods for the round voyage, out and home, if no *homeward* cargo is in fact loaded on board, the underwriter shall only retain two-thirds of the premium, unless there be a stipulation to the contrary. (t) Boulay-Paty, admitting the law to be as thus fixed by the Code, yet contends, and apparently with very good reason, that such a provision, in cases where the outward and homeward passages together make one entire risk insured at one entire premium, is opposed to sound principle, and must be regarded as an anomalous exception to the general rules of maritime law on this subject. (u)

SECT. II. Return of Premium in cases of Illegality or Fraud.

ART. 1. In cases of Illegality.

Return of premium in cases of illegality or fraud.

Where the risk is illegal, the assured shall not recover back the premium for *in pari delicto potior est conditio possidentis*.

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§ 422. Where the risk has never commenced, the premium may be recovered back, as money advanced *without any consideration*; but if it have been advanced on a consideration which fails, *because the contract is illegal*, then another principle comes into play, and the case falls within the rule *in pari delicto potior est conditio possidentis*: accordingly, where the policy is void for illegality, either as being in its form a

(r) *Bermon v. Woodbrige*, Dougl. 781. *v. Lynch*, 11 John. 239. *Homer v. Dorr*, 10 Mass. 26. }

(s) † *Donath v. Ins. Comp. of North America*, 4 Dallas, 463, cited 2 Phillips, (t) Code de Commerce, art. 356.

on Ins. 539, and see the other cases cited (u) Boulay-Paty, Cours de Droit Com. there from pp. 538-541. { *Pollock v. Mar. tom. iv. sect. 19, pp. 97-100, ed Donaldson*, 3 Dallas, 510. Col. Ins. Co. 1834.

wager policy, or as being designed to cover the risk of illicit or prohibited trading, the assured, unless he was ignorant of the fact of the illegality (for ignorance of the law is no excuse) will not be entitled to any return of premium,¹ at all events, if he claims it after the contract, is executed (*i. e.* after the event has happened and the risk is over); nor, as the better opinion on the whole seems to be, even though he should prefer his claim while the contract is still executory, (*i. e.* before the happening of the event, and during, or even before, the pending of the risk): this last position, however, is still involved in so degree of doubt.

Return of premium in cases of illegality or fraud.

In one of the first cases in which the question arose, the policy was effected on the amount of a bond given by an East India captain to secure his private adventure, valued at 26,000*l.* "without further proof of interest than the bond, free of average and without benefit of salvage:" after the captain had arrived safe with his adventure, the assured claimed a return of the premiums (the receipt of which was acknowledged by indorsement on the policy,) on the ground that, this being a wager policy, the contract was void: Lord Mansfield, at the trial, being of this opinion, held that, as both parties were in *pari delicto*, the rule of *potior est conditio possidentis* applied, and that the plaintiffs could not recover the premium: on motion for a new trial the majority of the court refused the rule (Mr. J. Willes dissenting, because he thought it not a gaming policy): Lord Mansfield again rested his decision on the broad ground, that, as the transaction was illegal, "the court would assist neither party." — "Not," said his lordship, "*that the right of the defendant is better than that of the plaintiffs, but they must draw their remedy from clear fountains.*"

Premium paid on an insurance void as a gaming policy cannot be recovered back after the risk has commenced, and the event been determined. *Lowry v. Bourdieu*, Dougl. 468.

Mr. J. Buller, agreeing with Lord Mansfield in the application of the rule to the particular case, thus narrowed the ground taken by his lordship. "There is a sound distinction between contracts executed and executory; and if an action is *brought to rescind a contract, you must do it while the contract still remains executory, and then it can only be done on the terms of restoring the other party to his original situa-

Distinction taken by Mr. J. Buller between contracts executed and executory.

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¹ See *Jubel v. Church*, 2 John. Cas. 333.

Return of premium in cases of illegality or fraud.

tion. If the plaintiffs, in the present case, had brought their action before the risk was over and the voyage finished, they might have had a ground for their demand ; but they waited till the risk (such as it was, not, indeed, founded in law, but resting in the honor of the defendant) had been completely run." (v)

This distinction noted upon in case of illegal contracts by the Court of Common Pleas. *Tappenden v. Randall*, 2 Bos. & Pull. 467.

The distinction, thus pointed out by Mr. J. Buller, has been adopted in subsequent cases, especially by the Court of Common Pleas (w) : thus, in a case where money had been advanced as the consideration for a bond to pay a fixed annuity until the hop duties should amount to a certain sum ; and, *before that event took place*, the party who had advanced the money demanded it back again, on the ground that the contract was illegal — Lord Alvanley and the Court of Common Pleas held him entitled to recover, and Mr. J. Heath expressed his approval of the distinction between contracts executed and executory, if taken with due modifications. (x)

And again in *Aubert v. Walsh*, 3 Taunt. 276.

So, in a case where the plaintiff had effected a wager policy, whereby the defendant bound himself to pay 1000*l.* in case preliminaries of peace between Great Britain and France were not signed before 1st July, 1810 ; the same court, then presided over by Sir J. Mansfield, held that the plaintiff, who had brought his action *before the time specified had arrived*, might recover back the premiums he had so paid, although his only reason for wishing to rescind the contract appeared to be, that after it was made the defendant had become a bankrupt (y) ; referring to the distinction taken by Mr. J. *Buller, the Chief Justice, said, "that although there was some doubt of its soundness, unless accompanied with some qualification, yet, if properly modified, he thought there was good sense in it : " — " why should not a man say, you and I have agreed so and so, but the agreement is good for nothing ; I cannot bind you, and you cannot bind me, and therefore, I desire, *before the event happens*, that you will pay me back my

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(v) *Lowry v. Bourdieu*, 2 Dougl. 468.

(w) It was also acted upon, or rather extended, by the Court of King's Bench in the case of *Lacausade v. White*, 7 T. Rep. 535, where they held that a sum deposited with a stakeholder upon the event of an illegal wager, may be recovered back even after the event of the

wager : but the authority of this case has been shaken, if not entirely overturned, by the subsequent case, in the same court, of *Howson v. Hancock*, 8 T. Rep. 575.

(x) *Tappenden v. Randall*, 2 Bos. & Pull. 467.

(y) *Aubert v. Walsh*, 3 Taunt. 276.

money? *this is, in fact, a relieving against the effects which an illegal contract, if persevered in, would produce.*" (z)

In the last case in which the point arose, the soundness of this distinction was much questioned, as applied to the case of contracts void for illegality; and regret was expressed by Lord Ellenborough, that the courts had ever departed from the plain and intelligible rule, that where the contract is founded upon a consideration clearly illegal, neither party should be allowed a *locus standi*, so as to receive assistance in a court of justice: the facts of the case were these: a policy was effected on goods by the *Audaz*, (a Spanish ship,) or any other ship or ship, with the intention of covering an illegal shipment of cottons, to be imported into Liverpool from New Orleans, which place belonged to the United States, then at war with this country: in fact, however, no such shipment ever took place, nor were any cottons ever loaded on board the *Audaz* or any other ship within the scope of the policy: the assured on this claimed to recover back his premium, on the ground that the contract was illegal, and had never been executed: the court held he could recover nothing (a): with reference to the argument, on which the plaintiff founded his claim, Lord Ellenborough intimated that, giving the utmost latitude to that doctrine, at all events, it could only apply to a case where the assured had given *formal notice to the underwriter, that he renounced his contract before action brought*, distinct from the implied renunciation involved in bringing his action; and even to this extent Mr. J. Abbott (afterwards Lord Tenterden,) was very much disposed to doubt whether *the assured, after having once paid the consideration, and thus, as far as he was concerned, completed the contract, would be afterwards at liberty to rescind it.

It seems, therefore, very doubtful, whether the distinction in question between contracts executed and executory can be sustained when applied to the case of contracts void for illegality; and the better opinion appears to be, that supposing both parties to be *in pari delicto*, and no case of oppression or peculiar hardship to be made out, the simple and intelligible rule of *potior est conditio possidentis* ought to apply in all its generality.

Return of premium in cases of illegality or fraud.

But the soundness of this distinction as applied to return of premium on illegal insurances has been much questioned by Lord Ellenborough and the Court of King's Bench.

Where the insurance is void for illegality, even though the risk was never commenced under the policy, the assured cannot recover back his premiums, at all events, without a previous formal renunciation of the contract: *quære*, whether he can even then? *Palyart v. Leckie*, 6 M. & Sel. 290.

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(s) *Aubert v. Walsh*, 282.

(a) *Palyart v. Leckie*, 6 Maule & Sel. 290.

Return of premium in cases of illegality or fraud.

Where the risk has been run, and the event taken place, no return of premium can be claimed.

As in case of a re-insurance. *Andree v. Fletcher*, 3 T. Rep. 266.

Or trading with the enemy. *Vandyck v. Hewitt*, 1 East, 96.

Though by a foreigner, — ignorance of the law is no excuse.

Morck v. Abel, 3 Bos. & Pull. 35.

Ignorance of the fact is. *Oom v. Bruce*, 12 East, 225.

Where the risk has commenced and the event taken place, the application of this principle has never been doubted.

Thus, where the risk had commenced and a loss by capture taken place under a policy void, as being a reinsurance within the 19 G. 2 c. 37, s. 4., the Court of King's Bench decided, that there could be no return of premium. (b) So, where it appeared that the policy had been effected in this country to cover a trading with Holland, then in a state of war with Great Britain, and a return of premium was claimed after the risk had been run and a loss by capture taken place, the same court held, on the same principle, that no return could be made (c): on the same ground they held that no return can be claimed in respect of a policy intended to cover a trade carried on in contravention to our navigation laws; and this, though the assured be a foreigner, for that fact will not excuse his ignorance of the trade laws of the country with which he effects insurances and engages in commerce. (d) It is otherwise, however, where the policy is effected in ignorance of the facts: thus, where the agent of a foreigner effected an insurance in this country after hostilities had been actually declared against Great Britain by the foreign government of which the assured was a subject; but without any knowledge of that circumstance on the part of the agent, or any possibility *of knowing it at the time of effecting the policy: the court held, that under these circumstances, the premium should be recovered back, for the plaintiffs had paid for an insurance, from which, without any fault imputable to themselves, they could never derive any benefit. (e)

So, where a license, necessary to legalize the voyage, was — without the fault or knowledge of the assured, and contrary to the opinion and expectation which they might reasonably entertain — not procured till after the ship had sailed: this was held to fall within the same principle as the case last cited, and the plaintiff was allowed a return of premium. (f)

Where, however, the want of the license at the time of sailing was a fact within the knowledge of the assured, it

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Hentig v. Staniforth, 5 M. & Sel. 122.

Cowie v. Barber, *ibid.* 16.

(b) *Andree v. Fletcher*, 3 T. Rep. 266.

(c) *Vandyck v. Hewitt*, 1 East, 96.

(d) *Morck v. Abel*, 3 Bos. & Pull. 35. *Lubbock v. Potts*, 7 East, 449, S. P.

(e) *Oom v. Bruce*, 12 East, 225.

(f) *Henry v. Staniforth*, 4 Camp. 270.

S. C. as *Hentig v. Staniforth*, 5 Maule & Sel. 122. See also *Siffken v. Allnutt*, 1 Maule & Sel. 39.

was held that he could claim no return of premium, though the license was procured as soon as possible after the ship sailed. (g)

Return of premium in cases of illegality or fraud.

ART. 2. *Where Contract is void for Fraud.*

§ 423. It never has been doubted, and, indeed, on principle, is abundantly clear, that the premium must be returned, whenever the policy is rendered void by the fraud of the underwriter.

Premium must be returned wherever the policy is rendered void by the fraud or positive misrepresentation of the underwriter.

As, if an insurance be made on a certain voyage "lost or not lost," when the underwriter, at the time he subscribes the policy, *privately knows* that the ship has arrived safe, he will be bound to restore the premium. (h)

So, if the contract be void by the *positive misrepresentation* of the underwriter, the assured may recover back the premium (i); though a mere statement of the underwriter's *belief or expectation* would not entitle him to do so. (j)

*For some time, however, it was a subject of very fluctuating decision in our English courts, whether the assured was or was not entitled to a return of premium where the contract was rendered void *ab initio* by his own fraud. (k)

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The point, however, agreeably to truer notions of justice and good policy, is now clearly established in our English jurisprudence, that wherever the contract is avoided by *gross and actual fraud* on the part of the assured, whether committed by himself or his agent, there shall be no return of premium. (l)¹

Where the policy is avoided by the *actual fraud* of the assured or his agent, there can be no return.

(g) *Cowie v. Barber*, 5 Maule & Sel. 16.

(h) Lord Mansfield in *Carter v. Boehm*, 3 Burr. 1909.

(i) *Duffell v. Wilson*, 1 Camp. 401.

(j) *Pawson v. Watson*, Cowp. 787. *Barber v. Fletcher*, Dougl. 232.

(k) See the cases of *Whittingham v. Thornburgh*, 2 Vernon, 206. *Da Costa v. Scanderet*, 2 P. Will. 170. *Wilson v. Duckett*, 3 Burr. 1361. The two first at

Chancery, and the last at Common Law before Lord Mansfield, are in favor of allowing the return even in cases of gross fraud.

(l) *Tyler v. Horne*, Marshall on Ins. 661. *Chapman v. Fraser*, *ibid.* In *Tyler v. Horne* the fraud was very gross, for the assured had instructed his broker to effect the policy after receiving private information of the loss of the ship.

¹ See *Waters v. Allen*, 5 Hill, 421, 423, 424; *Hoyt v. Gilman*, 8 Mass. 336; *Schwartz v. U. States Ins. Co.* 3 Wash. C. C. 170; *Himely v. S. C. Ins. Co.* 1 Rep. Con. Ct. 154.

Return of premium in cases of illegality or fraud.

Aliter, in case of mere misrepresentation without actual fraud.

Premium may be returned where policy rendered void *ab initio*, by the fault of the assured, in not complying with warranties, &c.

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Or by making a material alteration.

There must, however, be *actual fraud* on the part of the assured, or his agents, thus to preclude him from recovering back the premium; a *mere misrepresentation* made without actual fraud (*i. e.* wilful intention to deceive) does not disentitle the assured to a return of premium: the rule is thus stated by Sir Vicary Gibbs: "Where there is fraud there is no return of premium, but, upon a mere misrepresentation without fraud, where the risk never attached, there must be a return of premium." (*m*)

In the same way, where the contract is avoided, *ab initio*, by the fault of the assured (under such circumstances as not to imply actual fraud) in failing to comply with any *warranty*, *either express or implied*, the assured will be entitled to a return of premium: thus, if the ship do not sail on the day prescribed, or do not depart with convoy, or be not seaworthy,¹ and there be no fraud on the part of the assured, he may recover back the premium. (*n*)

*If the policy is rendered void by the act of the assured, in making a material alteration in it after subscription, and without consent of the underwriters, the assured will not be entitled to a return of premium. (*o*)

SECT. III. *Return of Premium for want of Interest, and in cases of Short Interest and over Insurance.*

Return of premium for want of interest, and in cases of short interest and over-insurance.

Return of premium cannot be apportioned according to the duration of the risk.

§ 424. We have seen that, if the risk have once commenced, there can be no return of premium in respect to its greater or less *duration*; and the reason is very plain, because the

(*m*) *Feise v. Parkinson*, 4 Taunt. 639.

(*n*) *Marshall on Ins.* 663. Numerous cases decide this point incidentally. *Henckel v. Royal Exch. Ass. Comp.* 1 Ves. 317, (*breach of warranty of neutrality*.) *Allen v. Long*, *Marshall on Ins.* 668, (*to sail with convoy*.) *Annan v. Woodman*, 3 Taunt. 299, (*unseaworthiness*); and *Colby v. Hunter*, 3 C. & P. 7, (*warranted in port*.) In all these cases return of premium was claimed and allowed. The rule has been explicitly recognized in the

jurisprudence of the United States. 2

Phillips on Ins. 546-548. { *Delavigne v. United Ins. Co.* 1 John. Cas. 310. *Murray v. United Ins. Co.* 2 John. Cas. 168. *Graves v. Mar. Ins. Co.* 2 Caines, 339. *Elbers v. United Ins. Co.* 16 John. 128. *Duguet v. Rhinelander*, 1 John. Cas. 360. *Murray v. Col. Ins. Co.* 4 John. 443. *Richards v. Mar. Ins. Co.* 3 John. 307. }

(*o*) *Langhorn v. Cologan*, 4 Taunt. 329.

¹ *Ante*, 1211, in note.

degree of risk cannot be calculated by duration (*i. e.* it may be as great in a day as in a month): but it is otherwise with the *amount* of the insurable interest or the *value* at risk, it being abundantly obvious, that upon two lots of property of different values exposed to the same perils the degree of risk is very different: the risk, in fact, *varies with the value*.

Hence, where the assured has *no* interest covered by the policy, either because the interest in respect of which he insures is only a bare contingency or expectation, and not an insurable interest, or because he effects an insurance on the wrong ship: in either case he is entitled to a return of premium.

The rule, in fact, is, that if, through mistake, misinformation, or any other innocent cause, an insurance be made, without any interest whatsoever, the insured is entitled to recover back the whole premium. (p) ¹

Where a prize is taken *after declaration of war*, the captors from the moment of capture acquire, under the prize acts, a *contingent insurable interest*, liable, indeed, to be divested by subsequent sentence of restoration, but valid till then: accordingly, where captors having thus taken a prize *after war *declared*, sent her home, and effected an insurance on her on their own account, after which, upon arrival, she was, by sentence of the English Court of Admiralty, restored to her owners: it was yet held, that, as the risk on the ship had commenced under the policy, the assured could not claim a return of premium. (q)

On the other hand, where a ship is taken as prize *before war declared*, the captors had not even a contingent insurable interest in her, but merely a *bare expectation depending on* the bounty of the crown, in respect of which they cannot insure: if, in such case, the ship be lost, after they have effected an

Return of premium for want of interest, and in cases of short interest and over insurance.

Where the assured has no interest at risk he will be entitled to a return of premium.

If the risk has once commenced under a policy effected by captor, to protect his interest in prize, taken in time of war, he cannot claim a return of premium. Boehm v. Bell, 8 T. Rep. 154.

* 1225

Alia, where the ship insured has been taken before war declared. Routh v. Thompson, 11 East, 428.

(p) For almost every position in this section, see the great work of Emerigon, chap. xvi. Du Ristourne.

(q) Boehm v. Bell, 8 T. Rep. 154.

¹ Steinback v. Rhineland, and Steinback v. Church, 3 John. Cas. 269. A bottomry interest, not being insured *as such*, and goods being insured, but none being on board answering to the description in the policy, the assured has a right to repayment of premium. Robertson v. United Ins. Co. 2 John. Cas. 250. See Waddington v. United Ins. Co. 17 John. 23.

Return of premium for want of interest, and in cases of short interest and over insurance.

insurance on her on their own account, and the underwriters avail themselves of the want of interest to defeat the claim, the assured will be entitled to a return of premium, if there be no illegality in the voyage, nor fraud in effecting the policy. (r)

In this last cited case it is to be observed, that a loss had occurred, and an action been brought against the underwriters, who resisted the demand, on the ground that there was no insurable interest.

But where the risk has been run, and the ship arrived, the assured cannot afterwards claim a return of premium on the ground of *having no insurable interest*.
M'Culloch v. Royal Exch. Ass. Comp.
3 Campb. 406.

Where, however, there was an insurance on ship and freight, and the ship had arrived safely, and earned freight, Lord Ellenborough would not allow the assured afterwards to claim a return of premium, on the ground that *he had no insurable interest*, on account of a defect in his title to the ship.

Lord Ellenborough, after adverting to the distinction above pointed out between the two cases, said, "as the underwriters in that case denied their liability on the policy, they were not allowed to retain the premium; *but here the voyage has been performed, and the ship has arrived in safety. The freight has been earned and paid.* It strikes me as now too late to rip up the matter, and say you had no insurable interest. You might have rescinded the contract before the event; but after that has been determined in favor of the underwriters, it does not lie in your mouth to tell them they were never *liable, and that the premium was a payment without consideration." (s)

1226 *

Where insurance is effected by mistake, as on goods by the wrong ship, the assured is entitled to a return.

So much for cases turning on the mere *want of insurable interest*: of course, if, by mistake, an insurance is effected on goods on board the wrong ship, &c., and it turns out that the assured has no scintilla of interest at risk under the policy, he will be entitled to a return of the whole premium, less the usual deduction of half per cent. (t)

Principle on which a return of premium can be claimed in case of over insurance, double insurance, &c.

§ 425. With regard to return of premium for short interest, over insurance and double insurance, the principle on which the cases depend is simply this: *that if the underwriter could*

(r) Routh v. Thompson, 11 East, 428.

(t) Martin v. Sitwell, 1 Shower, 156.

(s) M'Culloch v. Royal Exch. Comp.
3 Campb. 406.

at any time, and under any conceivable circumstances, have been called on to pay the whole sum on which he has received premium, in such case the whole premium is earned, and there shall be no return: if, on the other hand, he could never, in any event, have thus been called on to pay the whole, but only a part of the amount of his subscription — say a half or a fourth, — he ought not to retain a larger proportion than one half or one fourth of the premium, and must return the residue. (u)¹

Return of premium for want of interest, and in cases of short interest and over insurance.

The cases in which he may be so called on to make return are, 1st, where in either a *valued* or *open* policy *only part*, of the property specified in, or declared on, the policy is put on board; as, for instance, if “100 bales of cotton” be insured “valued at 1000*l.*,” or “at 10*l.* per bale;” or if “100 bales of cotton” be specified in the policy as the subject of insurance, *without any valuation*, — in such or the like cases, if there be only 50 bales on board, or only *half* the quantity of interest intended, and declared to be insured, a return of half the premium must be made for *short interest*. (v)

Return of premium for short interest.

Where “*freight*” is insured generally, in a valued policy, *at a gross sum on a general or seeking ship, this must be taken to mean *freight on a complete cargo*: if, therefore, at the time of loss, there is less than a complete cargo on board, or contracted for, and ready to be shipped, it should seem that there must be a proportionate return of premium for short interest (w): so, in the case of an insurance “on *profits*,” if the profits on a certain quantity of goods are insured, and only part of the goods be put at risk, it has been held

* 1227

(u) *Stevens on Average*, 200, 203, 5th ed. *Marshall on Ins.* 649. See this test applied in *Fisk v. Masterman*, 8 Mees. & Wels. 165; and see also 2 *Magens*, 137, note to No. 534.

(v) *Stevens on Average*, 204, 5th ed.

(w) *Forbes v. Aspinall*, 13 East, 323. The point was not determined in this case, but appears to follow from the principles regulating return of premium. See also as to goods, *Rickman v. Carstairs*, 5 B. & Ad. 651.

¹ See *Holmes v. United Ins. Co.* 2 John. Cas. 329; *Pollock v. Donaldson*, 3 Dallas, 510. Where a part-owner of a cargo ordered a policy intended to cover his own interest and that of the other part-owners, but had no authority to insure for the others, in respect to whose interests the policy did not attach, he was held to be entitled to a return of premium on the excess insured over his own interest. *Foster v. U. S. Ins. Co.* 11 Pick. 85; *Finney v. Warren Ins. Co.* 1 Metcalf, 16.

Return of premium for want of interest, and in cases of short interest and over insurance.

Return of premium for over insurance.

No return on valued policies for over insurance.

Return of premiums in cases of double insurance.

1228*

that the assured is entitled to a ratable return of premium. (x)

The next case is, where in an *open policy* on goods or freight the sum insured (*i. e.* the aggregate of the different subscriptions) exceeds the value of the property at risk : as, for instance, if the amount underwritten be 1000*l.*, and the insurable value of the goods on board be only 500*l.*, it is evident that the underwriters, in case of loss, could only have been called upon to pay to the extent of 500*l.*, or half the sum insured : consequently, by the rule above stated, there must be a return of half the amount of the premium. This is called a return for *over insurance*.

In *valued policies*, as we have already seen, unless the valuation be *fraudulent*, or grossly enormous, it will not be set aside ; but the assured, in case of loss, supposing the whole of the property to which the valuation refers to have been then on board, will be entitled either to the whole or an aliquot part of the whole sum : as, therefore, the underwriters, upon such a policy, might, in the event of a total loss, have been called upon to pay the whole sum insured : they are entitled to return the whole premium, and no return can be made for *over insurance*, though the sum in the policy may be double the value of the effects insured. (y)

In cases where, after effecting one insurance on his property, the merchant, who is ignorant of its real value, and wishes to be fully protected, effects further insurances on the same property, by other policies, with a different set of underwriters, the law is clearly settled in this country, that, if the total amount thus insured on the different policies exceeds the insurable value of the property at risk, the merchant can only recover up to the extent of such value ; but may do so from whichever set of underwriters he pleases (*i. e.* up to the extent of their subscriptions,) leaving the different underwriters to contribute ratably amongst themselves to the loss. (z) There is, also, no doubt that, in such cases of double insurance, the assured is entitled to a ratable return of premium, proportioned to the amount by which the aggregate sum

(x) *Eyre v. Glover*, 10 East, 218.

(y) *Stevens on Average*, 200, 5th ed.

(z) See *ante*, Part I. Chap. X. of *Double Insurance*.

Marshall on Ins. 652, citing 2 *Magers* 137, note.

insured in all the policies exceeds the insurable value of the property at risk.¹

It remains only to consider, how the return of premium, in such cases, is apportioned amongst the underwriters themselves.

In the first place, it is clear that, where the *over insurance* is by a single policy, all the underwriters contribute ratably to the return of premium, without regard to the date of their subscriptions: in this respect the rule is accurately laid down by Mr. Marshall: "all the underwriters upon a *policy*, in which the effects are insured beyond their value, must bear any loss that may happen, and repay a part of the premium, in proportion to their respective subscriptions, without regard to the priority of their dates." (a)

It is also stated by Emerigon, as the rule of the law maritime, and is so considered in this country, that *several policies effected on the same date* are considered to form but

Return of premium for want of interest, and in cases of short interest and over insurance.

In case of over insurance on a single policy, all the underwriters thereon contribute ratably to the return.

Several policies of the same date are considered as one policy, and follow the same rule.

(a) Marshall on Ins. 649.

¹ A vessel was insured for a certain premium against all the usual risks from Boston, to, at, and from Martinico, the risks resulting from a blockade not being included. The assured having heard of the arrival of the vessel at Martinico, and supposing that island to be blockaded by the British, upon that belief applied to the same underwriters, to insure them against the risks of that blockade. The insurers acting on the same belief, took the risk, and indorsed on the policy the following memorandum, namely. "Boston, 3d September, 1804. As the schooner Mary and Eliza, [the vessel in question,] has got into Martinico, we, the subscribers, in consideration of an additional premium of twenty-six and one third per cent., agree to take the risk of the same at and from thence to her port of discharge in the United States, without prejudice to this policy." The policy was in the usual printed form, providing that any prior policy shall first operate, and the latter shall be void, when the interest is fully covered by the former. In fact, the supposed blockade did not exist at the time, or while the vessel remained at Martinico. Parsons, Ch. J., said; — "The words of the memorandum are general, and by it no property is covered, and no risks are insured against, but those which are contained in the policy. On this view of the subject, without considering the motives or grounds of making the memorandum, the insurance thereby effected must be considered as a double insurance, and the premium cannot be recovered." The learned judge, in giving a construction to the memorandum, said; — "To us it appears, from the representation on which the memorandum was made, that the parties contemplated no other risks, but those arising from an existing blockade, and that the memorandum can be extended to no other risks. If we are right in this opinion, the memorandum does not extend to any risks, except those which might arise from a blockade, which the jury have found never existed. There could not, therefore, be any possible loss incurred by the underwriters, in consequence of making the memorandum. And as the memorandum was made through innocent error, and, without any fraud, it is void, and the premium stipulated, as the consideration for making it, cannot be recovered." *Taylor v. Sumner*, 4 Mass. 56.

Return of premium for want of interest, and in cases of short interest and over insurance.

1229 *

What is the rule where there are several policies of different dates. Rule of the foreign law.

Rule as laid down by Mr. Marshall.

Inconveniences of this rule.

Present rule of English law. That in case of over insurance by several sets of policies of different dates, the underwriters on the prior sets shall make no return of premium; but the underwriters on the subsequent sets shall make a ratable return.

one policy; and the rule, therefore, as to the return of premium in this case is the same as in the last. (b)

*The difficulty is, as to the case where several policies, or sets of policies, are effected on the same subject at *different dates*.

As to this, it was long supposed that the rule of the continental law differed from our own. By the foreign law maritime, in such case, the policy, or policies, first in point of date are alone to be considered binding up to the amount of the value actually at risk; and the return of premium is confined to the underwriters on the other policies. (c)

The rule of the English law, as it was supposed to result from that laid down by Lord Mansfield in *Davis v. Gildart*, is thus expressed by Mr. Marshall: "If, by several policies, made without fraud, the sum insured exceed the value of the effects, these several policies will, in effect, make but one insurance, and will be good to the extent of the interest of the assured: and, in case of loss, all the underwriters on the several policies shall pay according to their respective subscriptions: *and it follows from thence, that all the underwriters on the several policies would be equally bound to make a return of premium for the sum insured above the value of the effects in proportion to their respective subscriptions.*" (d)

The rule as thus stated has been recognized as the law of this country by subsequent writers, especially Mr. Stevens and the able author of the article on Marine Insurance in "M'Culloch's Commercial Dictionary," who point out the practical inconvenience and injustice of the regulation, and the superiority of that which prevails on the continent. (e)

Since then, the Court of Exchequer has introduced an important modification, and assimilated the English to the continental rule. Founding itself upon the equitable principle, that *those underwriters who have at any time been liable to pay the whole amount of their subscriptions are entitled to retain the*

(b) Emerigon, chap. xvi. sect. 4, vol. ii. p. 196, ed. 1827. See also the case of *Fisk v. Masterman*, 8 Mees. & Wels. 165, in which the sets of different policies, effected on the same day with different offices and underwriters were regarded as all one.

(c) Emerigon, chap. xvi. sect. 4, pp. 140, 141.

(d) Marshall on Ins. 649.

(e) Stevens on Average, tit. Return of Premium, p. 205, 5th ed.; and see case 1, 2, 3, *ibid.* pp. 207-215. See also M'Culloch's Com. Dict. tit. Marine Insurance, p. 702, ed. 1837.

whole amount of the premium, that court has established the *position, that where two sets of insurances are effected at different dates, and with different sets of underwriters, on the same property, and the amount of the first insurance is not equal to the value at risk, though the aggregate amount of both insurances exceeds it, in such case the underwriters, on the last of the two sets of insurances in point of date, shall alone be called on for a ratable return of premium; the underwriters on the prior set of insurances retaining the whole.

Return of premium for want of interest, and in cases of short interest and over insurance.

* 1230

The facts of the case were shortly these: — a merchant in New Orleans having shipped a large consignment of cottons to a Liverpool house, directed them to effect an insurance, which they immediately did, on the *twelfth* of April, by several policies in *London*, to the amount of 14,150*l.*, and on the *thirteenth* of April, by several other policies, both in *Liverpool* and, also, at *London* (the agents in the one place being unaware of what was being done at the other,) to the amount of 22,300*l.* more: thus the total amount insured was 36,450*l.* (14,150*l.* on the 12th of April, and 22,300*l.* on the 13th): the value of the cottons, as fixed by the different policies, was 30,333*l.*, which left 6116*l.* 10*s.* as the amount of over-insurance on the aggregate of all the policies. The cottons having arrived safely, the court, after argument, decided that as, in case a loss had occurred before the policies of the 13th of April were effected, the underwriters upon the policies of the 12th of April would have been liable to the full extent of their subscriptions, so they were entitled to retain the whole amount of their premiums.

Fisk v. Masterman, 8 M. & Wels. 165.

The court directed accordingly, 1. That the assured should have a return of premium to the amount of the over-insurance — such amount to be ascertained by taking into account *all the policies*; 2. That no return of premium was to be made in respect of the policies effected on the *twelfth* of April; 3. But that all the underwriters who subscribed the policies of the *thirteenth* should contribute ratably to the return, in proportion to the sums insured by them respectively on that day. (*f*)

* 1231

*In the United States, where the common law rule is as

Rule and practice in the United States.

Return of premium for want of interest, and in cases of short interest and over insurance.

stated by Mr. Marshall, it has become customary to insert into their policies an express stipulation, to the effect that, "if the assured has made any prior¹ insurance on the property, the insurers shall be answerable only for so much as the amount of such prior insurance may be deficient towards covering the property, *and shall return the premium* upon so much of the sum insured as they shall be exonerated from by such prior insurance, excepting half per cent. &c. (g):" this clause establishes, by express stipulation, the rule which, since *Fisk v. Masterman*, may in this country be regarded as part of our common law.

SECT. IV. *Return of Premium under express Stipulation.*

Return of premium under express stipulation.

General stipulation as to return of premium.

§ 426. It is frequently agreed between the parties, that, upon the happening of a certain event, or the performance of some stipulation, the assured shall return a part of the premium; and clauses to this effect are accordingly, in such case, inserted in the policy.

Returns of premium are generally stipulated to be made "if the ship sails with convoy *and arrives*," or simply "if she sails with convoy" — if she sails on or before a certain day — or ends the voyage short of its ultimate destination; and, in general, for any thing that lessens the risk of the underwriter, who, having received a premium commensurate with the extent of the whole risk for the voyage, agrees (according to the condition) to make a proportionate return, if any specified occurrence take place to decrease that risk. (h)

Stipulation to return premium in case the ship sails with convoy, and arrives.

1232 *

The clause which has given rise to the greatest amount of discussion in our jurisprudence, is that which provides for a return of part of the premium in case the ship "*sails with convoy and arrives*."

*The reason for this stipulation, and the meaning of the parties in inserting it, is thus expressed by Lord Mansfield. "Dangers of the sea are the same in time of peace and of

(g) 2 Phillips on Ina. 531.

(h) Stevens on Average, 194, 5th ed.

¹ See *Brown v. Hartford Ins. Co.* 3 Day, 56; *New York Ins. Co. v. Thomas*, 3 John. Cas. 1.

war ; but war introduces hazards of another sort, depending on a variety of circumstances, some known, others not, for *which an additional premium must be paid*. These hazards *are diminished by the protection of convoy* ; if the assured will *warrant* a departure with convoy, there is a diminution of the risk ; but, if he will not, he pays the full premium, and, in that case, the underwriter says, "*if it turn out that the ship departs with convoy, I will return part of the premium.*" — "But," continues his lordship, "a ship may sail with convoy, and yet, by storm or other accident, may in a day or two lose its protection : to guard against that risk the underwriter adds in policies of the present sort, "*the ship must not only sail with convoy, but she must ARRIVE in order to entitle you to the return.*"

Return of premium under express stipulation.

Reason for, and meaning of, this stipulation.

The words "*and arrives*," do not mean that the ship shall arrive *in company of the convoy* ; but only, that *she herself shall* arrive. If she does, that shows either that she had convoy for the whole voyage, or did not want it. (i)

Construction of the words "*and arrives*."

The construction thus put by his lordship on this clause, has ever since been followed, and the *arrival of the ship* is now established to be the sole point on which the return of premium depends, even in policies on other interests, as "*goods*," "*freight*," &c.

Thus, in the case of *Simond v. Boydell* itself, Lord Mansfield upon the principles just laid down, decided, that though the policy was on *goods*, upon which the underwriters had paid an average loss in respect of sea-damage incurred before the ship's arrival, yet, as the ship herself had sailed with convoy, and ultimately arrived safe at her port of destination, the assured, under a stipulation to return 8 per cent. if the ship "*sails with convoy and arrives*," was entitled to a full return of 8 per cent. on the whole amount of the insurance, including therein the sum which the underwriters had paid as a loss on the damaged goods. (j)

Simond v. Boydell, Dougl. 263.

* 1233

Upon the authority of this case, Lord Kenyon decided, that in a policy on *freight*, with a stipulation to return 10 per cent. "*if the ship sailed with convoy and arrived*," — the

Aguilar v. Rodgers, 7 T. Rep. 421.

(i) *Simond v. Boydell*, Dougl. 270, 271.

(j) *Simond v. Boydell*, Dougl. 263.

But see *Stevens on Average*, 196, 5th ed. where he states the practice to be that

the underwriter makes no return of premium on the amount he has paid for a particular average loss.

Return of premium under express stipulation.

assured was entitled to the whole return *calculated on the whole amount of the insurance*, because the ship, though she had been captured and recaptured on her voyage, was ultimately brought into her port of destination, subject, however, to a charge of 9*l.* 14*s.* for salvage, which the underwriters paid into court. (*k*)

The arrival contemplated by this clause is an arrival of the ship at her destined port in the course of the voyage.

In this case Lord Kenyon said, that in order to satisfy the meaning of the clause, the arrival of the ship should "*be an arrival at the destined port in the course of the voyage*;" and he intimated, that if a ship arrived at her neutral port of destination, in the possession of the enemy, or at her port in this country, as the property of other persons, after a capture, that would not be such an arrival as to entitle the assured, under this clause, to a return of premium. (*l*)

If ship sails with convoy, and arrives; but the goods insured are afterwards lost, the assured is entitled both to a return of premium and a total loss. *Horncastle v. Haworth, Marsh. on Ins.* 681.

If goods are insured with a stipulation to return a certain rate of premium "if ship sails with convoy and arrives;" if the ship does sail with convoy and arrive at her port of discharge, though she be there captured before she have completed the unloading of her cargo, and thus totally lost with the residue of the goods on board, the assured will be entitled to the stipulated return of premium, in addition to a payment of the whole sum insured as for a total loss. (*m*)

1234 *

In all these cases the arrival of the ship is the sole test of the right to claim a return of premium.

In fact, in all these cases, the *arrival of the ship* is the sole test of the return of premium, and no regard is had by the parties to the condition of the goods, on the ship's arrival. *The total or partial loss of the goods* is the subject of the *indemnity*, and must be paid by the underwriters. "But, as to the return of the additional premium, whether the goods arrive safe or not makes no part of the question; the single principle which governs is, that in the events which have happened, the war risk has been rated too high." (*n*)

The words "and arrive" mean arrival at the ultimate

The words "and arrive" mean arrival at the ship's ultimate port of destination; hence, if it be agreed in the policy

(*k*) *Aguilar v. Rodgers*, 7 T. Rep. 421. The practice agrees with this decision, it being the custom for the underwriters, in case of capture and recapture, to return the whole stipulated amount of premium on the whole sum insured, without retaining any thing in respect of *salvage charges*; and the rule is the same as to *general average charges*: a distinction being

made between *charges* and *losses*. *Stevens on Average*, 198, 5th ed.

(*l*) 7 T. Rep. 422.

(*m*) *Horncastle v. Haworth*, before Sir J. Mansfield in Common Pleas, 25th Feb. 1806. *Marsh. on Ins.* 681.

(*n*) Per Lord Mansfield in *Simond v. Boydell*, Dougl. 271.

to return different portions of the premium in case the ship sail with convoy for different portions of the voyage and *arrive*, no return of any portion of the premium can be claimed if the ship never, in fact, arrives at her port of ultimate destination.

Return of premium under express stipulation.

port of destination: hence, although it be stipulated to return different portions of premium on ship's sailing with convoy for different stages of the voyage, and arriving: no return can be claimed unless she arrives at her final port. *Kellner v. Le Mesurier*, 4 East, 386.

A ship was insured "at and from Lisbon to Cadiz, and at and from thence to Flushing, at a premium of twenty guineas per cent., to return 8 per cent. if the ship sail with convoy from Cadiz to England, and 2 per cent. more for convoy from England to Flushing: or 10 per cent. *if with convoy for the voyage and arrives.*"

The ship, after reaching England from Cadiz with convoy, was lost by British capture before she could complete her voyage by arrival at Flushing.

Lord Ellenborough held, that *no* return could be claimed within the meaning of this policy, as the ship had never arrived at Flushing, her ultimate port of destination; the words "*and arrives*," his lordship said, annexed a condition which overrode equally all the stipulations in the policy, as to returns of premium; and the true meaning of the clause was this: — to return 10 per cent. *if the ship sail with convoy for the voyage and arrives*; if from Cadiz with convoy for England, 8 per cent.; and 2 per cent. more for convoy from England to Flushing. (o) In this case, the arrival at Flushing was held, on the true construction of the policy, to be a condition affecting all the preceding stipulations: where, however, the stipulation was "to return 5 per cent. if the ship sails **with* convoy for Gottenburgh, and arrives, and 5 per cent. more if she sails for her port of delivery and arrives;" the Court of Common Pleas thought it questionable whether a return of premium might not be due for her arrival at Gottenburgh, though she never arrived at her ultimate port of delivery. (p)

Leevin v. Cormac, 4 Taunt. 483.

* 1235

During the disturbed state of our commerce in the last great European war, owing to the enforcement of Napoleon's continental system, a practice sprung up, which ceased with the state of things that called it forth, of stipulating to return a portion of the premium "*for arrival.*" (q)

Stipulation to return a portion of the premium "*for arrival.*"

(o) *Kellner v. Le Mesurier*, 4 East, 386.

(p) *Leevin v. Cormac*, 4 Taunt. 483. note.

(q) *Stevens on Average*, 198, 5th ed.

Return of premium under express stipulation.

Under this stipulation, if the ship arrives in her port of discharge, though the goods be there seized on board of her before they can be unloaded, the assured is entitled to the stipulated return of premium. *Dalglish v. Brooke*, 15 East, 295.

Remarks of Mr. J. Bayley.

1236 *

That loss was by an excepted risk is no objection to the assured's claiming a return of premium.

Where the words "and arrives" are not inserted, the construction is different.

In the only case of this kind which came before the courts, it appeared that goods were insured on a Baltic risk, with the usual latitude as to touching and staying, sailing backwards and forwards, &c. "*until the captain could find a port*," the risk on the goods to continue till the same should there be discharged and safely landed, *with a warranty to be free from capture or seizure in the ship's port or ports of discharge*, at a premium of fourteen guineas, to return 7 per cent. for ARRIVAL.

The goods were, in fact, seized on board the ship after she had moored in Pillau roads for the purpose of discharging them, and were, therefore, considered by the court to have been seized in the *ship's port of discharge within the warranty*; the underwriters consequently were discharged from the loss; but the court, nevertheless, held that there had been such an arrival of the ship as to entitle the assured to the stipulated return of premium. (r)

As to this, Mr. J. Bayley says, "both the ship and goods arrived safely for the purpose of exonerating the underwriters from all risks of the voyage, to answer which they had received a large premium, part of which they engaged to return for arrival. An arrival has taken place, and they have had the benefit of it; but they say, that because some persons have *taken from the assured the goods after arrival, though they, the underwriters, are not to bear the loss, yet they are to keep the whole premium. This does not seem to me the fair meaning of the contract." (s)

It is clear from this case that it is no objection to the claim for a return of premium that the loss was one not insured against, provided the ship have arrived. (t)

§ 427. Hitherto we have been considering the cases in which the stipulation is for a return if the ship sails with convoy and arrives.

Where the words "and arrives" are not inserted, but the stipulation is simply for a return, "if the ship sails with convoy," the construction is different, and the rule of *Simon v. Bydell* will not apply.

(r) *Dalglish v. Brooke*, 15 East, 295. *Phillips on Ins.* 543, 544. } *Robertson v. Col. Ins. Co.* 8 John. 491. *Ogden v. Fireman's Ins. Co.* 12 John. 114. }

Hence, where, in an insurance on *goods*, with a stipulation to return so much per cent. "for convoy," the assured claimed to recover the stipulated return (on the ground that the ship had sailed with convoy) *in addition to a total loss*, the jury refused to give it, saying, that the assured had a right, in case of a total loss, to add the whole amount of premium to his invoice, and so could recover it in that shape included in the total loss. Sir James Mansfield, before whom the case was tried, did not object to this; nor was the court moved upon it. (u) Mr. Stevens, indeed, says, that it has been long the practice at Lloyd's never to make return upon the amount paid by the underwriter for losses, whether particular average or total (v): and in cases where the rule of *Simon v. Boydell* does not apply, this may perhaps be taken to be the law as well as the practice.

If a return of premium be stipulated, in case the ship sails with convoy, and before she can do so, the underwriters are discharged by a breach of warranty, the assured will, it seems, be nevertheless entitled to the stipulated return. (w)

*What constitutes a *sailing with convoy* so as to entitle the assured to claim a stipulated return of premium within the meaning of these clauses, may be seen by the following case:—a ship, insured "at and from Oporto to Leghorn at 12 guineas per cent., to return 6l. if she sailed with convoy from the coast of Portugal and arrived," sailed under convoy from Oporto to Lisbon, the general rendezvous, in order to proceed thence with the whole fleet. The Oporto fleet, however, being dispersed on its way to Lisbon, lost the convoy, on which, the ship in question, then judging it for the best, ran for England, and arrived. Lord Eldon held that, upon the true construction of this clause, which only required a sailing with convoy from *some part of the coast of Portugal*, the assured was entitled to the stipulated return of premium by the ship's having sailed with convoy from Oporto and arrived in England. (x)

In the last case in the English reports on the subject of this section, it was held that, under a stipulation in a time

Return of premium under express stipulation.

In such cases if a total loss occurs, the assured is not entitled to claim, in addition thereto, a return of premium. *Langhorn v. Allnutt*, 4 Taunt. 510.

Where underwriters on a policy containing such a stipulation are discharged by breach of warranty before it can be complied with, the assured is nevertheless entitled to his return.

* 1237.

What constitutes sailing with convoy under this stipulation. *Audley v. Duff*, 2 Bos. & Pull. 111.

Construction of stipulation in time policy for a return of premium if ship sold or laid up. *Hunter v. Wright*, 10 B. & Cr. 714.

(u) *Langhorn v. Allnutt*, 4 Taunt. 510. *Marshall on Ins.* 676.

(v) *On Average*, 126, 5th ed.

(w) *Meyer v. Gregson*, *Marshall on Ins.* 682.

(x) *Audley v. Duff*, 2 Bos. & Pull. 111.

Return of premium under express stipulation.

policy on a ship "for a return of premium, if *sold or laid up*, for every uncommenced month," the assured was not entitled to a return, by reason of the ship's having been laid up for several months out of the year for which the policy was in force, as it appeared that she was employed again within the year: for the words *laid up*, being in connection with the word *sold*, must be taken to mean such a *permanent laying up* as would take place if the ship had been sold, and would put a final end to the policy. (y)

SECT. V. *Deduction of One Half per Cent.*

Deduction of one half per cent.

Custom to allow deduction of one half per cent.

1238 *

§ 428. In all those cases where the premium is returnable, either in whole or in part, it is customary to allow the underwriter one half per cent., unless, indeed, there be an express stipulation in the policy against it. Therefore, wherever *it is said that the whole premium is returned, it is to be understood with this exception. This is a very old custom, as may be seen from the foreign laws and ancient jurists collected by Emerigon (z); and from him cited by later writers.

Reason for this allowance.

As to the reasons of the allowance, jurists have differed: Emerigon following the authority of the Guidon, in considering it as given to the underwriter as a reward for his trouble in signing the policy (*droit de signature*) (a); while Pothier (b), who in this respect is supported by Boulay-Paty (c) and the majority of later writers, regards it as an indemnity to the underwriter for the loss he sustains by the non-performance of the contract on the part of the assured.

The best reason is that given by Mr. Marshall, who says, that, "as the insurer *can never by his own act discharge himself from the contract*, it seems but reasonable that, where the assured thinks proper, to put a stop to the adventure, and prevent the risk from ever commencing, he should make

(y) Hunter v. Wright, 10 B. & Cr. 714.

(z) Chap. xvi. sect. 6, tom. ii. p. 201, ed. 1827. See also Stevens on Average, 206, 5th ed.

(a) Emerigon, chap. xvi. sect. 6, *supra*.

(b) *Traité d'Assurance*, No. 181.

(c) *Conférence sur Emerigon*, chap. xvi. tom. ii. p. 203, ed. 1837.

some compensation to the insurer for his trouble and disappointment." (d)

Deduction of one half per cent.

But, whatever the reason may be, the rule is in practice always acted upon at Lloyd's, where no stipulation is made to the contrary. (e)

Always acted on in practice.

If, indeed, the underwriter, at the time of subscription, were in fact informed, or must have known of some radical defect avoiding the contract — as if he were to insure goods when he knew of their safe arrival, or seamen's wages, or contraband goods, knowing them to be such — in such and the like cases equity dictates, and the rule is, that he can have no claim to this allowance. (f)

Except where the conduct of the underwriter has been fraudulent.

* 1239

Pothier, supposing the claim to be founded on the avoidance of the contract by the *act of the assured*, considers that the underwriter could not deduct a half per cent. if the inception of the risk was prevented by the act of God, as by the ship or goods being destroyed by lightning, fire, or other accident, after the policy was subscribed, but before it had attached (g): but Emerigon and Boulay-Paty consider this a refinement, and the latter points out that the modern law expressly gives the underwriter the right to make this deduction on the ground of indemnity (*à titre d'indemnité*,) from whatever cause the avoidance of the risk may arise. (h)

Apart from this excepted case, the deduction is always allowed, whether the avoidance of the contract, or non-inception of the risk, be caused by the act of the assured or the act of God.

To provide against this deduction, stipulations are frequently introduced into policies, that, under certain circumstances, the whole premium shall be returned.

SECT. VII. *Practice as to Paying the Premium into Court.*

§ 429. In all cases where there is reason to suppose that the assured may be entitled to claim a return of premium, it will be advisable for the underwriter in defending an action on the policy, to pay the premium into court under a plea of payment in the common form.

Practice as to paying the premium into court.

Premium should be paid into court whenever it is likely the assured will be entitled to a return.

(d) Marshall, 662. Stevens on Average, 206, 6th ed.

(e) Stevens on Average, 206.

(f) Emerigon, chap. xvi. sect. 6, citing Pothier, *Traité d'Assurance*, No.

182. Valin, *Comment. on Ord. tit. des Assurances*, art. 16, 17, 38, 41.

(g) *Traité d'Assurance*, No. 182.

(h) Emerigon, *quæ supra*. Boulay-Paty, *Conférence sur Emerigon*, tom. ii. p. 203, ed. 1827.

Practice as to
paying the
premium into
court.

Consequences
of not so doing.

Counsel for
plaintiff need
not mention in
opening his
case an inten-
tion to claim
return of pre-
mium.

1240 *

If this be not done, and the nature of the defence established be such as to show that the risk never had an inception, and, consequently, that a return of premium is due, then if the declaration contains a count for money had and received as well as a special count on the policy, no costs shall be recovered on the first or special count, but under the common count the plaintiff will be entitled to the general costs, and so much of the costs of the trial as were necessarily incurred by him in support of the common count. (i) ¹

Lord Eldon, while Chief J. of the Common Pleas, was of opinion that if the nature of the defence were such as that the plaintiff must *necessarily* recover back the premium if he failed in his demand for a loss, there the plaintiff's counsel *need not state a single word to the jury about return of premium: where, on the other hand, the failure of the greater demand did not *necessarily* imply a right to recover upon the less, his lordship inclined to be of opinion that the plaintiff's counsel should, in fairness, state that he meant to go for a return of premium: finding, however, the practice of the courts to be against him on this point, his lordship gave way; and the practice is now understood to be that the counsel for the plaintiff need not in any case mention in his opening an intention to claim a return of premium: but if the defendant's case shows he is entitled thereto, may claim and recover it under the count for money had and received at any time before verdict: ² the reason given for this practice being that by setting up a demand for return of premium, in the first instance he might disparage his own case, by confessing a doubt, at least, of being able to sustain his principal claim. (j)

(i) The practice was so settled in *Penson v. Lee*, 2 Bos. & Pull. 333. *son v. Lee*, 2 Bos. & Pull. 339.

(j) *Marshall on Ins.* 663. Per Cham-

¹ See *Penniman v. Tucker*, 11 Mass. 66; *Foster v. U. States Ins. Co.* 11 Pick. 85; *Waddington v. United Ins. Co.* 17 John. 23. In reference to the allowance of interest on a return of premium, see *Waddington v. United Ins. Co.* 17 John. 23

² But the court will not, after verdict, grant a new trial only for that the jury did not find for the return of premium, no notice, at the trial, having been taken of the point to the jury. *Penniman v. Tucker*, 11 Mass. 66.

*CHAP. XII.

* 1241

RECOVERY BACK OF LOSSES IMPROPERLY PAID—CLAIMS FOR
SALVAGE IMPROPERLY WITHHELD.

§ 430. It sometimes happens that after a loss has been paid, the underwriter discovers that there was fraud, or misrepresentation, or concealment in the original contract, or that there were other circumstances attending the loss, which, if known at the time the loss was claimed, would have justified his resisting the demand. In such case he may maintain an action for money had and received against the assured, or the broker who has effected the policy, to recover back the sum which has been so paid; and which is familiarly termed in insurance law a *foul loss*: where the action in such case is brought against the broker, it cannot be sustained, if the latter have actually paid over the loss to the assured, on the principle that one man is not to be a loser by the mistake of another: in such case the action should be brought against the assured himself: if, however, the broker has merely passed the loss in account with his principal, but not actually paid it over to him, this will be no answer to the action brought by the underwriter for its recovery. (a)

If, however, the underwriter at the time he paid the money, knew, or might, upon inquiry, have been informed of the grounds upon which he could have resisted the claim, he cannot afterwards bring an action to recover it back:¹ for in such case the general convenience requires that the party paying it should be estopped from further contesting his liability, as otherwise the door would be opened to infinite *litigation (b): and the same principle would apply a *fortiori*

Recovery back of losses improperly paid — claims for salvage improperly withheld.

If underwriter, after payment of loss, discovers fraud or other circumstances avoiding the contract which he was not apprised of before, he may recover back the loss so improperly paid.

Such losses are called *foul losses*.

The action cannot be maintained against broker who has actually paid over the loss: *aliter* if he has only passed it on account.

Where underwriter knew, or might have known, the ground of defence at time of payment, action will not lie.

* 1242

(a) *Buller v. Harrison*, Cowp. 565; (b) *Bilbie v. Lumley*, 2 East, 469, and see the principle of law well developed in the case of *Cox v. Prentice*, 3 Maule & Sel. 344.

¹ See *Barlow v. Ocean Ins. Co.* 4 Metcalf, 270.

Recovery back of losses improperly paid — claims for salvage improperly withheld.

If otherwise, it will, though loss paid under legal compulsion.

After payment of a total loss, money, had and received, lies for salvage, unless claim is waived.

to cases in which the underwriter has mistakenly paid a loss under compulsion of legal process (c);¹ unless, indeed, an exception to this rule be admitted, as it most probably would, in cases where, after the assured has recovered a loss by legal process, the underwriter receives intelligence of *fraud*, which he could not, by any possibility, have known while the suit was depending. (d)

If, after payment of a total loss, the salvage, or the proceeds of its sale, be withheld from the underwriter, he may bring an action for money had and received against the assured (e); and will recover in such action unless he have done any act at the time of settling the loss (as by paying less than the whole amount of insurance in full of all demands,) whereby he waives his claim to salvage. (f)

(c) *Marriot v. Hampton*, 7 T. Rep. chap. xviii. sect. 5. vol. ii. pp. 290-293, 269, overruling *Moses v. Macfarlane*, 2 ed. 1827.

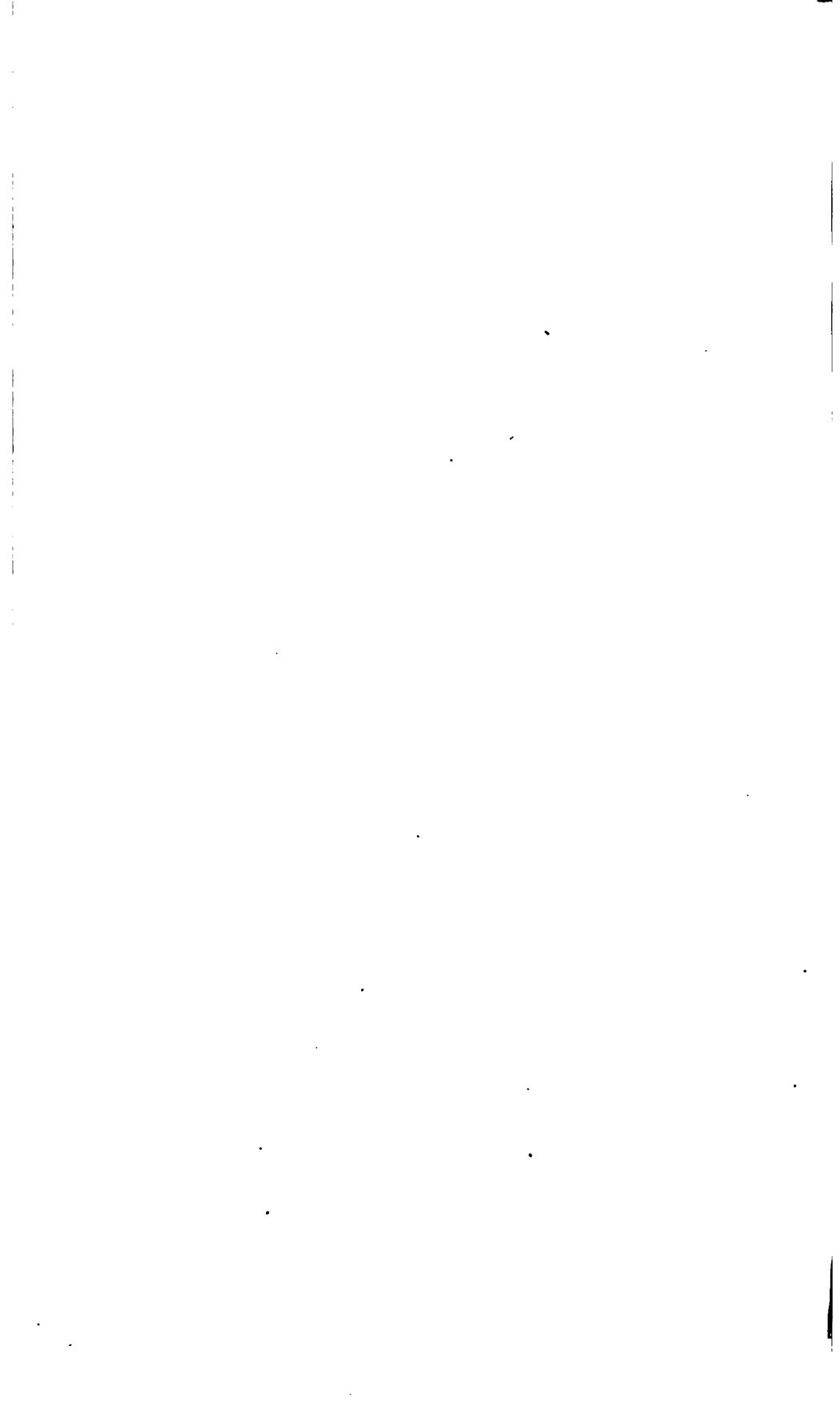
Burr. 1009, and *Livesay v. Rider*, cited 7 T. Rep. 269. (e) *Roux v. Salvador*, 3 Bingh. N. C. 288.

(d) See as to this, the observations of (f) *Brooks v. McDonnell*, 1 Y. & Coll. Marshall on Ins. 741; and see *Emerigon*, 320.

¹ *Homer v. Fish*, 1 Pick. 435. See *Elting v. Scott*, 2 John. 157.

PART IV.

**MODES OF PROCEDURE BY WHICH THE RIGHTS AND DUTIES
OF THE PARTIES TO THE POLICY MAY BE ENFORCED.**



*CHAP. I.

* 1245

JURISDICTION OF COURTS.

§ 431. WHATEVER might have been the case in former times, it is now quite certain, and, indeed, matter of every day practice, that the proper tribunals in this country for trying the rights and duties of parties to policies of marine insurance are the superior courts of law at Westminster :¹

Jurisdiction of courts.

The superior courts of law are the proper tribunals for trying actions on policies.

Their jurisdiction cannot be ousted by agreement in the policy to refer to arbitration.

¹ In *De Lovio v. Boit*, 2 Gallison, 308, which was a libel brought in the district court upon a policy of insurance, Mr. Justice Story decided, that a policy of insurance is a maritime contract, and therefore within the cognizance of courts of admiralty and maritime jurisdiction. The jurisdiction of the admiralty over policies of insurance was again asserted and sustained in the case of *Andrews v. Essex F. & M. Ins. Co.* 3 Mason, 6, and in the case of *Peele v. Merchants Ins. Co.* 3 Mason, 27. Of this last case, Mr. Justice Putnam, in *Deblois v. Ocean Ins. Co.* 16 Pick. 310, in giving the judgment of the court said;—it “was the case of the ship *Argonaut*, which was litigated for years under circumstances of considerable excitement. It was at first brought before this court. Afterwards it was sustained under the admiralty jurisdiction of the court of the United States for this circuit, and a decree was made for the plaintiff, accompanied with a most elaborate and learned argument in favor of the decree. An appeal was taken to the Supreme Court of the United States, and it is believed that the admiralty jurisdiction was not sustained. At any rate the case appeared again in our court. See also *American Ins. Co. v. Ogden*, 20 Wendell, 296. But in *Hale v. Washington Insurance Company*, 2 Story, C. C. 176, which was a libel in Admiralty on a policy of insurance, Mr. Justice Story reasserted and affirmed the doctrine of *De Lovio v. Boit*, respecting the jurisdiction of the district courts of the United States, as courts of admiralty, over policies of insurance. In this case, the learned judge said;—“Nearly twenty-seven years have elapsed, since, in the case of *De Lovio v. Boit*, 2 Gallison, 308, I had occasion to consider and to affirm the jurisdiction of the district courts of the United States, as courts of admiralty, over policies of insurance. I have not unfrequently been called upon, in the intermediate period, to reexamine the same subject, and I wish now only to state, that I deliberately adhere to the doctrine therein stated. Indeed, in the various discussions, which have since taken place, here and elsewhere, I have found nothing to retract, and nothing to qualify, in that opinion, in respect to the true nature and extent of that jurisdiction, and its importance to the commercial and maritime world. To no nation is it of more importance and value to have it preserved in its full vigor and activity, than to America, as one of the best protections of its maritime interests and enterprises. It was my hope and expectation, many years ago, that the jurisdiction of the admiralty over policies of insurance, would have been finally settled in the Supreme Court of the United States, in a cause from this circuit then pending before it. But the cause went off without any decision. But I have reason to believe that, at that

Jurisdiction of courts.

Allier, where an award has been made, or even *semble* a reference pending.

Courts of equity, generally speaking, have no jurisdiction in cases of insurance.

But in cases of *mistake*, courts of equity will reform the policy.

1246 *

Will compel trustee to permit his name to be used in action on policy.

Will compel disclosures of fact.

and so clearly is their jurisdiction established in cases of this kind, that it cannot be ousted even by an express clause inserted in the policy, to the effect that, in case of any dispute between the parties, the matter shall be referred to arbitration (a);¹ although, if an award have actually been made, it will be a bar to an action; and the case would perhaps be the same, where the parties have submitted their differences to arbitration, and the reference is still depending. (b)

Courts of Equity, as a general rule, have no jurisdiction in questions of insurance (c): their right to entertain such questions only arises in cases where the common law has no power to deal with them satisfactorily, and the interposition of an equitable jurisdiction becomes necessary for the advancement of justice. Thus, as we have already seen, in clear cases of manifest mistake, the Court of Chancery will interpose to alter the terms of the policy to that which, on satisfactory evidence, appears to have been the true intention of the parties (d): they will, on application of *cestui que* *trust, compel a trustee to permit his name to be used, in a suit at law, on the policy, for the benefit of the party really interested (e): they will, also, compel disclosures of fact and the production of documents by the assured in a suit depending at law; and before the 1 W. 4. c. 42. would grant commissions to take depositions abroad, and issue an injunc-

(a) *Kill v. Hollister*, 1 Wils. 129. See the principle recognized in *Thompson v. Charnock*, 8 T. Rep. 139. *Gladstone v. Osborne*, 2 C. & P. 551.

(b) See the judgment of the court in *Kill v. Hollister*; but the last point seems doubtful: as to the stamp required on the agreement and award, where the several underwriters on one policy have agreed to refer, see *Goodson v. Forbes*, 6 Taunt. 171. 1 *Marshall's Rep.* 525.

(c) So laid down in *De Ghetoff v. London Ass. Comp.* 3 Br. & P. C. 525.

(d) *Motteux v. London Ass. Comp.* 1 Atk. 545. *Henckell v. Royal Exch. Ass. Comp.* 1 Ves. 317. The law is the same in the United States, 2 Phillips on Ins. 383. < *Delavigne v. Union Ins. Co.* 2 Caines, 343. *Hogan v. Delaware Ins. Co.* 1 Wash. C. C. 419. *Ewer v. Wash. Ins. Co.* 16 Pick. 502. *Graves v. Boston Mar. Ins. Co.* 2 Cranch, 441. >

(e) Per Lord Hardwicke, 1 Atk. 547.

time, my learned brothers, Mr. Chief Justice Marshall and Mr. Justice Washington, were prepared to maintain the jurisdiction. What the opinion of the other judges then was, I do not know; but I have no reason to believe that a majority of them were opposed to the jurisdiction." See *Ramsay v. Allegre*, 12 Wheaton, 638.

¹ See *Halfhide v. Fenning*, 2 Bro. C. C. (Perkins's ed.) 336, 337, notes and cases cited; 1 Duer, Ins. 90, 91, § 38; *Allegre v. Maryland Ins. Co.* 6 Harr. & John. 406; *Robinson v. Georges Ins. Co.* 17 Maine, 131.

tion to stay proceedings in the meantime (*f*): in the United States, they have decreed the specific performance of an agreement to make or renew a policy. (*g*) So, where a policy has been obtained by *fraud*, a court of equity is the proper tribunal to which to apply, to compel the assured to surrender it to be cancelled. (*h*) In one case, the Court of Chancery are said to have granted an injunction, on the application of the owner of the cargo, to restrain the master from selling the cargo to pay debts for which the owner was not answerable (*i*); but that court dismissed a bill for an injunction to restrain the captain from delivering the cargo to the consignees until a contribution in general average could be adjusted. (*j*)

It seems at one time to have been considered that courts of equity had a peculiar jurisdiction in cases of *general average* contribution (*k*); but it is now clearly settled that, though resort may probably still be had to the Court of Chancery in complicated cases of contribution, yet, generally speaking, the mode of proceeding is by action at law, whether the claim be made by the shipowner against the owners of the cargo (*l*), or by one shipper of goods against another (*m*), or by either against the underwriter. (*n*)

*There may, indeed, be cases in which the policy is so framed that an action at law will not lie upon it; and in such cases the proper mode of proceeding is by bill in Chancery. Thus, where three of the directors of a fire insurance company executed a policy to indemnify the plaintiff against loss by fire, whereby they directed, ordered, and appointed the *directors for the time being* to pay any loss which the plaintiff might sustain by fire, Lord Tenterden and the Court of King's Bench held, that no action at law could be maintained on this policy either against the three directors

Jurisdiction of courts.

Or order policy to be surrendered and cancelled in cases of fraud.

When they will grant injunction on captain.

Courts of equity have no peculiar jurisdiction in cases of general average contribution.

* 1247

Where the policy is so framed that an action at law will not lie upon it, the proper mode of proceeding is by bill in Chancery.

Alchome v. Saville, 6 Moore, 202.

(*f*) *Chitty v. Selwyn*, 2 Atk. 359. The 1 W. 4, c. 42, has vested in the courts of common law the same powers as to issuing commissions, &c. which was formerly exercised by courts of equity.

(*g*) † *Perkins v. Washington Ins. Comp.* 4 Cowen, 645. 2 *Phillips on Ins.* 563.

(*k*) *Whittingham v. Thornborough*, 2 Vern. 206. *Wilson v. Duckett*, 3 Burr. 1361. *Da Costa v. Scanderet*, 2 P. Wms. 170.

(*i*) *Morrison v. Noorman, Benecké, Pr.* of Indem. 259.

(*j*) *Hallett v. Bousfield*, 18 Ves. 187.

(*k*) *Sheppard v. Wright*, Show P. C. 18.

(*l*) *Birkley v. Presgrave*, 1 East, 220. *Price v. Noble*, 4 Taunt. 123.

(*m*) *Dobson v. Wilson*, 3 Camp. 480.

(*n*) *Milward v. Hibbert*, 3 Qu. B. 120.

Jurisdiction of
courts.

Andrews v. El-
lison, *ibid.* 199.

who had executed it, or against the directors for the time being : for, as to the former, it was merely an order by them to third parties to pay the loss ; and, as to the latter, they never having executed the policy, it was not their deed. (o) Where, however, an action of covenant was brought against three of the directors of a similar company, who had executed a policy under seal, whereby *it was stipulated and declared* that, on certain conditions (which were alleged to have been complied with,) plaintiff should be entitled to a remuneration out of the society's funds in case of loss by fire, the Court of C. Pleas held that the action was well brought ; this case being manifestly distinguishable from that last cited, because *here the defendants had themselves executed the deed, and there they were not parties to it.* (p)

(o) Alchorne v. Saville, 6 Moore, 202
in notis.

(p) Andrews v. Ellison, 6 Moore, 199.

*CHAP. II.

* 1248

FORM OF ACTION.

§ 432. ON policies by private underwriters, being instruments not under seal, the proper form of action is *assumpsit*, and the declaration must be specially framed: against the two old incorporated companies, the Royal Exchange and the London Assurance, debt or covenant is the proper form (*a*); and the same observation applies to such of the various incorporated or joint stock companies, formed since the 5 G. 4. c. 114. (A. D. 1824,) as employ policies under seal. (*b*) Where, however, these companies, as is very frequently the case, use policies not under seal, the form of action on such policies, as in the case of those effected with private underwriters, will be *assumpsit*. (*c*)

Form of action.
Where policy not under seal, the proper form is *assumpsit*.

Debt or covenant against the London and Royal Exchange Assurance Companies.

Against the new companies depends on nature of policy, whether under seal or not.

The new pleading rules allow, and it is usual in practice to add to the special count on the policy, counts for money had and received, and for an account stated, under the former of which the plaintiff, if he is entitled thereto, may enforce his claim to a return of premium. (*d*)¹

(*a*) See, however, Chitt. Pl. vol. ii. p. 279, 8th ed. Where debt lies, it may be frequently the preferable form, because a count may be joined for money had and received under which the premium may be recovered back; see a form against the London Ins. Comp. in Debt, *ibid*. By stat. 11 G. 1, c. 30, s. 43, these two companies are empowered to plead the general issue, and give under it special matters in defence. By Reg. Gen. Trin. Term, 1 Vict. the words "by statute" must now be inserted in margin of such plea.

(*b*) Such as *The Neptune*, *Benson v. Chapman*, 6 M. & Gr. 792, &c. (covenant.) *The Indemnity Mutual Marine*, *Milward v. Hibbert*, 3 Qu. B. 120, (debt.)

(*c*) See acc. *assumpsit* brought on policies of the General Maritime Ass. Comp. *Sutherland v. Pratt*, 12 Mees. & Wels. 16. *Ashley v. Pratt*, 16 Mees. & Wels. 471. *Of the Alliance Marine Ins. Comp. Manning v. Irving*, 1 Comm. B. 168, and many others.

(*d*) Reg. Gen. Hil. 7, 4 W. 4, reg. 5.

¹ See *Penniman v. Tucker*, 11 Mass. 66; *Foster v. U. States Ins. Co.* 11 Pick. 65; *Waddington v. United Ins. Co.* 17 John. 23.

PARTIES TO THE ACTION.

Parties to the action.

The action may generally be brought either in the name of the broker who has effected it, or of his principal, the party interested.

But no one not named therein can sue on the policy unless he has an interest.

§ 433. As, generally speaking, policies in this country are effected by brokers in their own name, for the benefit either of a named principal, or of whom it may concern, the general rule is, that the action on the policy so effected may be brought either in the name of the principal for whose benefit it was really made (a), or of the broker who was immediately concerned in effecting it (b)¹: it is treated, in fact, as the contract of the principal as well as of the agent. On the same ground, the action for a return of premium may be brought either in the name of the broker, or of the principal on whose behalf the policy was made. (c)

It must be understood, however, that in order to give a person not named in the policy the right of suing thereon, it must be proved that he has an interest not only in the subject insured, but in the policy (d)²: and if, after the policy be

(a) *Woolf v. Horncastle*, 1 Bos. & Pull. 323. *Routh v. Thompson*, 13 East, 274. *Lucena v. Crawford*, 2 Bos. & Pull. N. R. 279, and numerous other cases.

(b) *Usparicha v. Noble*, 13 East, 332. *Sargent v. Morris*, 3 B. & Ald. 281; and see *Story on Agency*, 130.
(c) *Martin v. Sitwell*, 1 Show. 156.
(d) *Crawford v. Hunter*, 8 T. Rep. 19.

¹ *Davis v. Boardman*, 12 Mass. 80; *Ward v. Wood*, 13 Mass. 539; *Steinbach v. Rhineland*, 3 John. Cas. 369; *Pacific Ins. Co. v. Catlett*, 4 Wendell, 75; *Lazarus v. Commonwealth Ins. Co.* 5 Pick. 76; *Copeland v. Mercantile Ins. Co.* 6 Pick. 198; *Farrow v. Commonwealth Ins. Co.* 18 Pick. 53; *Jefferson Ins. Co. v. Cotheal*, 7 Wendell, 82; *Cranston v. Phil. Ins. Co.* 5 Binney, 638; *Maryland Ins. Co. v. Graham*, 3 Harr. & John. 62; *Spring v. South Car. Ins. Co.* 8 Wheaton, 268. But one who procures insurance to be made, in his own name, for another person, or for whomsoever it may concern, cannot maintain an action on the policy, in his own name, if his authority is disavowed or revoked, before action brought, unless there is some express provision in the policy, such as "payable to him in case of loss," or he has a lien or other interest, which the party whose property is insured cannot defeat. *Reed v. Pacific Ins. Co.* 1 Metcalf, 166; *Copeland v. Mercantile Ins. Co.* 6 Pick. 198.

² *Newson v. Douglas*, 7 Harr. & John. 456; *Pacific Ins. Co. v. Catlett*, 4 Wendell, 75.

effected, but before the loss, he assign away his interest in the thing insured, he cannot sue on the policy, except as trustee for the assignee, and that only in cases where the policy is handed over to him on the assignment, or there is an agreement, that it shall be kept alive for his benefit. (e) ¹ Where, however, the assignment is not made till after the loss, he may, in all cases, sue thereon as trustee for the assignee. (f) *Where the policy contains the usual clause "lost or not lost," the party for whose benefit it was made may sue thereon in respect of average losses that had, without his knowledge, accrued to the thing insured before he became its owner, and before the policy was effected. (g)

Where the consignee of goods pledges the bill of lading with another person as security for advances made by him, upon an agreement that he (the consignee) shall effect an insurance on goods for the benefit of the pledgee, and deposit the policy with him, the pledgee may sue in his own name on the policy so effected for his benefit. (h)

If a policy is made in the names of A. and B., for the benefit of whom it may concern, and the whole interest is in A., he alone may sue on the policy. (i) ²

§ 434. As to the *defendants* in policies of insurance, the underwriters who subscribe policies are, as we have seen, only severally, and not jointly, liable; each separate sub-

Parties to the action.

Assignor of thing insured, who has assigned his interest before loss, can only sue on the policy as trustee.

* 1250

On policy "lost or not lost," party may sue for loss accruing before his interest commenced.

Pledgee of goods, who is also depositary of policy, may sue thereon, if made for his benefit.

Though policy made by two, one may sue, if alone interested.

On policies by private underwriters, action lies against each separately.

(e) *Powles v. Innes*, 11 Mees. & Wels. 10. < See *Carroll v. Boston Marine Ins. Co.* 8 Mass. 515. *Gordon v. Mass. F. & M. Ins. Co.* 2 Pick. 249, 258. > The law in the United States seems to allow the assignor to sue in all cases as trustee for the assignee. See cases cited, 2 Phillips on Ins. 597.

(f) *Sparkes v. Marshall*, 2 Bingham. N. C. 761.

(g) *Sutherland v. Pratt*, 11 Mees. & Wels. 296.

(h) *Sutherland v. Pratt*, 12 Mees. & Wels. 16.

(i) *Marsh v. Robinson*, 4 Esp. 98.

¹ See *Jessel v. Williamsburg Ins. Co.* 3 Hill, 88.

² *Rider v. Ocean Ins. Co.* 20 Pick. 265. So, where by a policy of insurance on a vessel, A. was insured for whom it concerned, and it was stated on the back of the policy, that it was understood that the insurance attached for A., B., and C. each one third, payable to A., it was held, that A., B., and C., might join in an action on the policy. *Williams v. Ocean Ins. Co.* 2 Metcalf, 303. But where several persons, joint owners of a vessel, jointly procure insurance to be made on her, and, afterwards, while the ownership remained the same, a loss happens, an action against the insurers, to recover for such loss, must be in the name of all the joint owners. One of the owners cannot alone maintain an action to recover either the whole or his particular share of the loss. *Blanchard v. Dyer*, 21 Maine, 111.

Parties to the action.

Who to be sued in actions against the London and Royal Exchange Companies.

scription being, in fact, a distinct contract : in actions, therefore, against private underwriters, one alone of the subscribers is generally made defendant, the rest agreeing to abide by the result of the suit : in actions brought against the two old companies, the defendants are sued respectively as "The Governor and Company of the London Assurance," and "The Governor and Company of the Royal Exchange Assurance." (*j*)

Who to be sued in actions brought against the new companies.

When the action is against any of the companies incorporated or associated since 5 G. 4. c. 114., it must be brought against those parties who, either by a clause in the policies, the deed of settlement, or the act of incorporation, are to be sued as their legal representatives : thus, on policies effected with the Alliance Marine Insurance Company, the action is brought against the chairman, under the provisions of an act of parliament, making the company liable to be so sued (*k*) ; and the case is the same with the Neptune Insurance Company (*l*) : in actions against the Marine Insurance (*m*), the General Maritime Insurance (*n*), and the Indemnity Mutual Insurance (*o*) Companies, the action is against those of the directors who have, in fact, signed the policy.

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In actions against members of mutual assurance associations.

Where the action is brought by a member of a mutual insurance association to recover his proportionate share of a loss, the action is against some other individual member of the association : the members of such associations being severally, and not jointly, liable. (*p*)

(*j*) See form, Chitty Pl. vol. ii. p. 278, 6th ed.

(*n*) Sutherland v. Pratt and others, 11 Mees. & Wels. 296. 12 ibid. 16.

(*k*) Manning v. Irving, 1 C. B. 168.

(*o*) Milward v. Hibbert, 3 Q. B. 120.

(*l*) Benson v. Chapman, 6 Man. & Gr. 702.

(*p*) For forms of such declarations, see Lees v. Smith, 7 T. Rep. 338. Strong v. Harvey, 4 Bingh. 304.

(*m*) Phillips v. Nairne and others, 16 L. J. C. Pl. 194.

*CHAP. IV.

* 1252

DECLARATION ON A POLICY OF MARINE INSURANCE.

THE New Rules of Pleading, Hilary Term, 4 W. 4. reg. 5., as far as they relate to declarations on policies of insurance, are as follows : —

Declaration on a policy of marine insurance.

“ Two counts on the same policy of insurance are not to be allowed.

New Rules of Pleading relating to declarations on policies of insurance.

“ But a count upon a policy of insurance, and a count for money had and received to recover back the premium upon a contract implied by law, are to be allowed.

“ The account stated may be joined, and there may be several breaches of the same contract.”

“ In actions on policies of insurance the interest of the assured may be averred thus — ‘ That A., B., C., and D., or some or one of them, were or was interested,’ &c. And it may also be averred that the insurance was made for the use and benefit, and on the account, of the person or persons so interested.”

By stat. 3 & 4 W. 4. c. 42. s. 29. *interest* is recoverable.

SECT. I. *General Outline of Declaration, and Reference to Precedents.*

The following are the principal heads of the declaration on a policy of marine insurance : —

General outline of declaration, and reference to precedents.

1. The declaration commences with a statement that the assured, either in person, or, as is generally the case, through the medium of an agent, (and this must be truly averred according to the fact,) made, or caused to be made, a certain policy of insurance.

1. Making of the policy.

General outline of declaration, and reference to precedents.

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2. The policy set forth.
3. Subscription and mutual promises.
4. Commencement of the risk.

*2. The policy is then set forth in terms, with every express warranty, and *material* memorandum, condition, and stipulation stated in full, whether such stipulation, &c., be contained on *the face* or written on the back of the instrument. (a)

3. The subscription of the contract by the defendant, in consideration of the premium, and the mutual promises, both of the assured and the defendant, are next alleged.

4. The declaration then states the commencement of the risk, either by the loading of the goods on board, (*if the policy be on goods*), or by the ship's being in good safety in the port of departure, (where the policy is on *ship*), or by the goods being loaded on board, or being contracted for and ready to be shipped on board, (*if on freight*), according to the facts and to the subject of insurance.

5. Averment of interest.

5. It is then averred that the assured, from the commencement of the risk to the time of loss, was interested in the subject of insurance, — to the amount, either of the value in the policy, where the policy is *valued*, or of the sums subscribed, where it is *open*.

6. Ship's sailing on her voyage — compliance with warranties.

6. It then proceeds to state that the ship sailed on her voyage on a certain day (except in cases where the loss occurs in port); and here, if there be any express warranties or stipulations contained in the policy, the declaration should aver an exact compliance with them; as, *e. g.*, that the ship sailed within the time mentioned in the policy, (*if there be a warranty for her sailing*), and with convoy (*if there be a warranty for her so doing*.)

7. Averment of the loss.

7. Then follows the description of the loss, the time of its occurrence, its cause, and its extent; as to which it is essential that in point of *time*, it must be shown to have taken place *within the duration of* the risk; in regard to *cause*, it must appear to be within the perils insured against; and as to *extent* to be either average or total.

8. Notice and demand of loss, and general breach.

8. Notice to defendant of such loss; a demand of the sum subscribed by him; and his refusal to pay, complete the outline of the declaration.

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*For the form of the declaration, the reader must be referred

(a) See as to this, *Strong v. Rule*, 3 Bingh. 315. *Graham v. Barrass*, 5 B. & Ad. 1011.

generally to the professed works on Pleading (b)¹; but the following reference to a few of the precedents contained in the reports may probably be of practical utility:—

General outline of declaration, and reference to precedents.

I. Forms of declarations against companies, members of insurance associations, &c.

1. *Debt* against directors of *Indemnity Mutual Marine Insurance*, on a time policy. (*Miward v. Hibbert*, 3 Qu. B. 120.)

(b) See, especially, Pearson's *Precedents*, 141–144.

¹ The following forms of counts upon marine policies of insurance, established in Massachusetts, will commend themselves, for convenience and brevity, to practical use in the courts of any of the United States.

I. ON A SHIP, FOR A TOTAL LOSS.

In a plea of the case, for that on the first day of March, in the year one thousand eight hundred and thirty-five, the plaintiff was the owner of the ship John, then lying in the harbor of Boston aforesaid; and the said Boston Marine Insurance Company, in consideration of a premium therefor paid to them by the plaintiff, made a policy of insurance upon the said ship for a voyage from said Boston to Cadiz in Spain, and at and from said Cadiz to her port of discharge in the United States; and thereby promised to insure for the plaintiff ten thousand dollars upon the said ship for the said voyage, against the perils of the seas and other perils in the said policy mentioned; (a) and the plaintiff avers that the said ship did on the second day of said March, sail from said Boston on the voyage described in said policy, and whilst proceeding therein was, by the perils of the seas, wrecked and totally lost; of which the said Insurance Company, on the tenth day of June last, had notice, and were bound to pay the same on demand; (or in sixty days); yet they have never paid the said sum of ten thousand dollars, though requested, (or though sixty days have elapsed.) To the damage, &c.

II. COUNT FOR A PARTIAL LOSS, AND FOR CONTRIBUTION TO A GENERAL AVERAGE.

[State the plaintiff's interest, the voyage, and the insurance, as in the last precedent, to (a) and proceed as follows.]

— and the said Company did, in and by the same policy, further promise that in case of any loss or misfortune to the said ship, it should be lawful for the plaintiff and his agents to labor for and in the defence and recovery of the said ship, and that the said Company would contribute to the charges thereof in proportion as the said sum assured by them should be to the whole sum at risk: and the plaintiff avers, that the said ship did, on the second day of said March, sail from said Boston on the voyage aforesaid; and whilst proceeding therein was, by the perils of the seas, dismantled, and otherwise damaged in her hull, rigging, and appurtenances; inasmuch that it was necessary, for the preservation of the said ship and her cargo, to throw over a part of the said cargo; and the same was accordingly thrown over for that purpose; by means of all which, the plaintiff was obliged to expend two thousand dollars in repairing the said ship at said Cadiz, and also (or, and is also liable to pay) the sum of five hundred dollars as a contribution to and for the loss occasioned by the said throwing over of a part of the said cargo; and the said ship also suffered much dam-

General outline
of declaration,
and reference
to precedents.

2. *Assumpsit* against three of the directors of the *General Maritime Assurance Company*. (*Sutherland v. Pratt*, 11 *Mees. & Wels.* 296.)
3. *Assumpsit* by one member of a mutual insurance association against another, setting out regulations indorsed on the policy. (*Strong v. Harvey*, 3 *Bingh.* 304.)

II. Forms of declarations by agents, &c.

1. *Assumpsit* by *party interested* on policy effected on his

age that was not repaired in said Cadix;—of all which the said Company, on the fourth day of September last, had notice,—and became bound to pay the same in sixty days; yet, though said sixty days have elapsed, they have never paid the said sum of ten thousand dollars, nor any part thereof. To the damage, &c. [See *Bryant v. Com. Ins. Co.* 6 *Pick.* 131.]

III. COUNT FOR A TOTAL LOSS OF A CARGO, BY FIRE.

In a plea of the case, for that on ——— a certain brigantine, called the *William*, was lying at said Boston, and the plaintiff was the owner of the cargo, (or of certain goods,) then laden or about to be laden on board of the said vessel; and the said C. D., in consideration of a certain premium therefor, paid to him by the plaintiff, made a certain policy of insurance in writing upon the said cargo, (or goods,) at and from said Boston to Hamburg, or any other port or ports in the north of Europe, and at and from thence to said Boston, or her port of discharge in the United States;—and the said C. D. by said policy promised to insure for the plaintiff—— dollars on the said cargo (or, goods) for the voyage aforesaid, against the perils of fire and other perils in the said policy specified;—and the plaintiff avers, that the said vessel, with the said cargo (or, goods) on board, did on ——— sail from said Boston on the voyage aforesaid; and afterwards, during the said voyage, whilst the said vessel, with the said cargo on board was lying at the port of Altona in the north of Europe, the said cargo (or goods) was burnt, and wholly destroyed by fire;—of which the said C. D. on ——— had notice, and became bound to pay the same in sixty days, yet he has not paid the said sum of ——— dollars, nor any part thereof. To the damage, &c.

IV. COUNT FOR A TOTAL LOSS OF FREIGHT, BY RESTRAINT, DETAINMENT, ETC.

——— for that on ——— the plaintiff was interested in the freight of a vessel called the *George*, then bound on a voyage hereinafter described; and the said Insurance Company, in consideration of a premium therefor, paid to them by the plaintiff, made a policy of insurance upon the said freight for the voyage from said Boston to one or more ports beyond the Cape of Good Hope, one or more times, for the purpose of disposing of her outward and procuring a return cargo, and at and from thence to New York, in the State of New York, and thereby promised to insure for the plaintiff three thousand dollars upon the said freight, for the voyage aforesaid, against the perils of enemies, pirates, assailing thieves, restraints and detentions of all kings, princes, or people, of what nation or quality soever, and against other perils in the said policy mentioned; and the plaintiff avers, that the said vessel did on ——— sail from said Boston on the voyage aforesaid, and afterwards, during said voyage, was forcibly taken on the high seas (or, at the Island of Sumatra, in the Indian Ocean) by certain persons to the plaintiff unknown, and detained and prevented from performing the said voyage, and thereby the said freight was wholly lost to the plaintiff;—of all which the said Insurance Company, &c.

behalf by brokers. (*Sutherland v. Pratt*, 11 *Mees. & Wels.* 296.) •

General outline
of declaration,
and reference
to precedents.

2. Same, another form, on a time policy (policy fully set out.) (*Redmond v. Smith*, 7 *Man. & Gr.* 457.)
3. Assumpsit, by the surviving partners of a firm of insurance *brokers* on a policy effected by them for a principal resident abroad. (*Bell v. Janson*, 1 *Maule & Sel.* 201.)
4. Assumpsit by brokers on policy effected by them as agents. (*Powles v. Innes*, 1 *Mees. & Wels.* 10.)

III. Forms of declarations on policies on different subjects of insurance.

1. On freight due under a charter-party, setting out the charter-party. (*Horncastle v. Suart*, 7 *East*, 400.)
2. On freight and passage money due under an agreement *setting it forth. (*Truscott v. Christie*, 2 *Brod. & Bingh.* 320.) *1255
3. On freight of a seeking ship, for loss sustained after cargo contracted for, but before it was put on board. (*De Vaux v. J'Ansen*, 5 *Bingh. N. C.* 519.)
4. On valued policy on *profits*. (*Stockdale v. Dunlop*, 6 *Mees. & Wels.* 224.)
5. On *bounty* to be allowed by the French government on a French whaler. (*De Vaux v. Steele*, 6 *Bingh. N. C.* 358.)
6. On policy on a bottomry bond, setting it out. (*Simonds v. Hodgson*, 3 *B. & Ad.* 50.)

IV. Forms of declaration as regards the allegation of losses.

1. Allegation of an average loss on *ship*, by being blown over in a graving dock. (*Phillips v. Barber*, 5 *B. & Ald.* 161.)
2. Allegation of total loss on *freight*, by ship's being lost in leaving dock, owing to the breaking of tackle, before any of the goods were loaded on board. (*De Vaux v. J'Ansen*, 5 *Bingh. N. C.* 519.)
3. Allegation of total loss on *ship*, by being first wrecked and subsequently plundered. (*Young v. Turing*, 2 *Man. & Gr.* 593.)

General outline
of declaration,
and reference
to precedents.

4. Allegation of total loss on ship by sea-damage, producing innavigability, and followed by sale. (*Parfit v. Thompson*, 13 *Mees. & Wels.* 392.)
5. Same, by unseaworthiness, occasioned by unskilful loading of goods on board. (*Redman v. Wilson*, 14 *Mees. & Wels.* 476.)
6. Average loss, by expense of repairs, claimed cumulatively to a total loss. (*Stewart v. Steele*, 5 *Scott, N. R.* 927.)
7. Allegation of loss sustained by shipowner by reason of having to pay general average contribution for goods jettisoned. (*Milward v. Hibbert*, 3 *Qu. B.* 120.)

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*SECT. II. *Parts of the Declaration.*

Parts of the
declaration.

The parts of the declaration of the greatest practical importance are the following: 1. The description of the mode in which the policy was effected, as by agents, &c. 2. The mode of setting forth the policy, especially with reference to the statement of express warranties, conditions, and exceptions, and the correct description of the subject insured. 3. The averment of the commencement of the risk. 4. The averment of interest. 5. The allegation of the mode of loss. We will consider these in their order.

ART. 1. *Description of the mode in which the policy was effected. Allegation of Agency.*

Form of de-
claring when
action brought
in the name of
the party in-
terested: alle-
gation of
agency.

§ 435. As we have already seen, most policies in this country are effected by brokers, and when so effected, the action may be brought in the name either of the broker (who is then called the *nominal assured*); or of his principal (or *party interested*); when brought in the name of the principal, the allegation generally is, "*that the plaintiff by E. F.*," or "*by certain persons called or known by the name, style, and firm of E. F. and Co., the plaintiff's agents in that behalf*,"¹ caused the policy to be made; the declaration generally also

¹ See *Maryland Ins. Co. v. Graham*, 3 *Harr. & John.* 62.

contains a further averment of the character and capacity in which the nominal assured effected the policy ; as, for instance, "*that the said policy was so made by the said E. F. and Co. as aforesaid, as agents for the plaintiff, and on his behalf ; and that the said E. F. and Co. did receive the order for and effect the said policy, as such agents as aforesaid :*" or "*were the persons who gave the order and direction to the person immediately employed to effect the policy ;*" the object of these last descriptive averments is to show that the parties effecting the policy as agents, come within the provisions of the 28 G. 3. c. 56. (c)

Allegation of agency.

*1257

*When the action is brought in the *name of the broker*, the allegation is, that the policy was made by the plaintiff as agent for the parties interested, and in their behalf ;¹ and that plaintiff either received the order for and effected the policy as such agent, or else that he gave the order and direction to the parties immediately employed in effecting it. (d)

When action brought in the name of the agents by whom policy was effected.

The *allegation of agency*, and of the capacity in which the policy was effected, is material, and must be proved as laid (e) : and so completely does the denial of it go to the gist of the action, that pleas formally traversing it have, since the New Rules, been held bad, on special demurrer, as amounting to the general issue. (f)

Allegation of agency is material, and must be proved, as laid.

For the proof sufficient to support these allegations, reference must be had to the Chapter on Evidence.

(c) See the declaration in *Redmond v. Smith*, 7 Mann. & Gr. 457, and in *Sutherland v. Pratt*, 11 Mees. & Wels. 296. These descriptive averments are not absolutely necessary ; i. e. the declaration, without them, would be good after verdict ; but, if inserted, they must be proved as laid. *Bell v. Janson*, 1 Maule & Sel. 204. *Redmond v. Smith*, *quâd* *suprà*. (d) *Powles v. Innes*, 11 Mees. & Wels. 10. (e) *Palmer v. Marshall*, 8 Bingham. 79. (f) *Redmond v. Smith*, 7 Mann. & Gr. 457. *Sutherland v. Pratt*. 11 Mees. & Wels. 296.

¹ In *Rider v. Ocean Ins. Co.* 20 Pick. 265, Mr. Justice Putnam, in a case of an action on a policy, remarked, — "If brought in the name of the agent, the declaration should state who were the real parties in interest at the time when the policy was made, and at the time of the loss: for no other persons would be entitled to recover upon the policy. The underwriters are entitled to have it truly stated on the record, whose interest the policy was intended to protect, although the action be brought in the name of the person who effected the policy, and although he be not himself interested. The parties really interested are to be considered so far parties to the suit as that their declarations, (while their interest continues,) shall be evidence for the defendants."

ART. 2. *Mode of setting forth the Policy. Description of subject of Insurance. Express Warranties, Conditions, and Exceptions.*

Policy must be set forth verbatim, together with all material clauses or stipulations, whether written on face or indorsed on back of it.

Mode of declaring where the words "*on ship*," "*on goods*," "*on freight*," &c., are written on foot or margin of policy.

1258 *

Where subject of insurance is specified in the valuation clause.

§ 436. The policy should be set out verbatim, leaving blanks in the declaration, whenever they occur in the common printed form, and taking especial care to set out at full every clause, memorandum, or stipulation, which materially affects the purport of the instrument, whether written on the face or the back of the policy, at its foot or margin; and whether expressed in a grammatical sentence, or merely in a form of words, to which usage alone has given a meaning.

Thus, as we have already seen, our common printed forms of policy being adapted solely to the case of an insurance both on ship and goods conjointly: in all other cases the policy is rendered applicable to the particular subject of *insurance, by writing (generally at the foot of the instrument) the words "*on ship*," "*on goods*," "*on freight*," "*on profits*," "*on bottomry*," &c., as the case may be.

The effect of the insertion of these words is to narrow the general terms of the policy, in point of construction, to the single subject of insurance thus specified; and the meaning of the memorandum is, "we mean to insure the subject so named, and adopt the general language of the policy, as far as it may serve to effectuate this object, but no further." (g)

Accordingly, in declaring on a policy with these or the like words at the foot or in the margin, it is alleged, that by a certain memorandum thereupon (or thereunder) written, it was declared that the said insurance was "*on ship*," or "*on goods*," or "*on freight*," as may be.

Instead of the words thus inserted at the foot or margin, the particular subject of insurance is not unfrequently specified in the valuation clause: in such case the allegations in the declaration must follow exactly the words of the clause: thus, in the case of *Simonds v. Hodgson* (h), where the subject of insurance was declared in the valuation clause to be on bottomry, &c.: the declaration, after setting out the policy

(g) Per Lord Ellenborough in *Robertson v. French*, 4 East, 141.

(h) 3 B. & Ad. 50.

alleged, "that it was thereby declared that the said ship, &c., goods and merchandise, &c., for so much as concerned the assured by agreement between the assured and assurers in that policy, were and should be valued at *l.* (*leaving this blank as in the policy*) on bottomry, free from average and without benefit of salvage."

Mode of setting out the policy.

Illustration from policy declared in valuation clause to be on bottomry.

As we have seen, it is very frequent, especially on shipments of produce, or bale goods, to specify in the policy the precise goods on which the insurance is effected by their marks and numbers.

Where goods are specified by marks and numbers, such marks and numbers must be set out in the declaration.

In such cases the declaration must set out in full the description of the goods; as, *e. g.*, where such description is in the margin of the policy, the allegation would be, "*and by a certain memorandum on the said policy written, it was declared, that the said insurance was on fifteen hogshéads of tobacco, marked B. S. No. 51. to 65.,*" or as the case may be.

* 1259

But although the declaration, in that part of it which professes to set out the policy, must be thus literally accurate in describing the specific subject of insurance as therein contained, yet the same strictness is not required in those subsequent allegations in which it avers the loading of the goods on board, their subsequent loss, &c.: in these parts of the declaration, the word "*premises*" being an apt description of the subject-matter actually insured, whatever that may be, is the most safe, and, therefore, the most proper word of reference to employ. (i)

Having once accurately described the subject of insurance, the declaration may afterwards refer thereto by the word "*premises.*"

On a policy "*on indigo and bale goods,*" after setting forth the policy, it was alleged in the declaration that "*divers goods, wares, and merchandises* were loaded on board," &c. and that the said policy was made "on the said goods and merchandises," and that the ship, "with the said goods and merchandises on board, was, by the force of the winds, &c. lost." It was objected, on *special demurrer*, that it did not appear by the declaration that the interest which the assured had on board was of the description of goods insured in the policy; and that the plaintiff had not averred that the goods on board were "*indigo and bale goods.*" But the court said, that the averment, that the policy was made *on the goods put on board*, completely answered the objection, since that could

And may aver generally, after setting out the policy, verbatim, "that divers goods, wares, and merchandise, were loaded on board."

Mode of setting out the policy.

not be true unless the indigo and bale goods were loaded on board, which it would be necessary for the plaintiff to prove on the trial. (j)

Mode of declaring on policies "on ship or ships," or "on goods to be thereafter declared and valued."

If a policy be made *on ship or ships to be thereafter declared, or on goods to be thereafter declared and valued*, the declaration should allege, if the fact were so, that the interest was declared to be on board such a ship, or that the goods were duly declared and valued by a memorandum on the policy, *before the loss.*" (k)

1260 *

Mode of declaring on policy altered, by consent, after subscription.

*If the policy has been altered by consent after subscription, the safer mode appears to be, to recite the policy as it originally stood, and then set forth the agreement for altering its terms, and the alteration made in pursuance thereof. (l)

Where alteration made by consent while policy is *in fieri*. Robinson v. Tobin, 1 Stark. 336.

In one case, however, where the alteration was inserted while the policy was *in fieri*, (i. e. before all the subscriptions were filled up,) it was held sufficient to set out the policy in the declaration according to its altered form: the policy in this case had been originally effected "*on the profits of goods valued at 500*l.**" to which defendant's name was subscribed. In the margin of the policy had been added afterwards, — "*on his share of the goods, say one fifth, valued at 1000*l.**;" and under these words defendant had signed his initials: the declaration, in setting forth the policy, alleged it to have been effected "*on the plaintiff's share of the goods, say one fifth, valued at 1000*l.**:" and Lord Ellenborough, on the above ground, held it to be good. (m)

The safest rule is to set out the policy *verbatim at literatim*.

As a general practical rule it may be laid down, that the safest plan is to set forth the policy precisely, and as nearly as possible in its own language, adding only what may be requisite to make its meaning intelligible, and substituting the past for the present tense.

Implied conditions and usages of trade need not be set out.

Every policy, as we have already had occasion to observe, besides its express terms, embraces, by construction of law, several implied warranties, and incorporates by reference all such usages of trade as are well known and established in the course of navigation and commerce to which it relates:

(j) De Symonds v. Johnson, 2 Bos. & Pull. N. R. 77.

(k) Harman v. Kingston, 3 Camp. 150.

(l) 2 Chitty, Pl. 110, 6th ed. where see form of declaring on an altered policy.

(m) Robinson v. Tobin, 1 Stark. N. P. 336.

neither the terms of these implied warranties, or incorporated usages, nor compliance therewith, need be alleged in the declaration; the one being inferred by the court from the terms of the policy as set forth, and the other being presumed till the contrary appears.

Mode of setting out the policy.

It is different with *express warranties*, which, being conditions precedent on the face of the policy, must not only be *set out in terms in the declaration, but compliance therewith carefully alleged. "Every positive averment or allegation on the face of the instrument, and making a part of the written contract, *whether inserted in the body of it, or written in the margin in a line with the body of the instrument, or transversely*, amounts to a warranty or condition: and if such allegation or condition be not strictly true, the assured cannot recover on the policy *to whatever cause the loss be owing*, whether the loss be connected with the subject of such warranty, or wholly independent of it: *for it is a condition on which the contract is to take effect, which failing, the contract fails.*" (n)

Express warranties, being conditions precedent, must; and compliance therewith averred.

*1261

Every such warranty, or condition, therefore, whether expressed in the policy in a grammatical clause, or by mere words at the foot, or on the margin, as "an American vessel," "warranted a Dane," "in port," "to sail on or before the 11th June," &c. must be set forth in the declaration as part of the policy, and a compliance with its terms carefully averred. This averment of compliance is frequently inserted in that part of the declaration which immediately follows the allegation of the ship's sailing on the voyage insured: but provided it be averred somewhere, it is immaterial where. (o)

Whether such express warranty is inserted by a formal or informal clause on the face of the policy.

And it makes no difference in this respect, whether the clause or words, that constitute a condition precedent, are written on the *face* or indorsed on the *back* of the policy: thus, where the regulations of an association of shipowners were indorsed on the back, and declared to form part of the policy, several of which regulations materially altered the situation of the contracting parties, *but none of them were set out in the declaration*: the plaintiff was nonsuited for this variance

Or indorsed on the back of it.

(n) Per Lawrence, J. in *Lothian v. Henderson*, 3 Bos. & Pull. 515. with express warranty, see 2 Chitty, Pl. 110. 6th ed.

(o) For mode of averring compliance

Mode of setting out the policy.

1262 *

So, where certain risks are excepted on the face of the policy, it should be averred that loss did not happen by means thereof.

Dalgleish v. Brooke, 15 East, 275.

But declaration without such averment will be good after verdict.

between the contract as alleged in the declaration, and as proved at the trial. (*p*)

*Not only must all express warranties and stipulations in the nature of conditions precedent be thus set forth, and compliance therewith averred, but *all exceptions of risks and losses* must also be set forth; and it should be shown on the face of the declaration, that the loss did not happen from the excepted risks or under the excepted circumstances.

Thus, on a policy on goods "free from capture and seizure in the ship's port of discharge," the declaration, after setting out the policy, alleged the loss with the exception "that while the ship, with the said goods on board thereof, was in the course of the said voyage, and before her arrival at the end thereof, *and not in the port of discharge*, the said ship and goods were, &c." averring a loss by capture. (*q*)

The omission of such averment would be ground of special demurrer, but will be good after verdict; for it will then be presumed that it appeared, by the evidence, that the loss did not come within the exception. (*r*)

ART. 3. *Averment of the Commencement of the Risk.*

Mode of stating the commencement of risk on policies upon "goods."

§ 437. Immediately after setting forth the terms of the policy, and averring the payment of the premium, the mutual promises of the assured and the underwriter, and the subscription by the latter of the policy — the declaration, proceeding with the narrative in order, states the commencement of the risk.

In policies on *goods* the risk, as we have seen, generally commences from the moment of their being loaded on board ship either at the port of departure, or at any other port at which, by the terms of the policy, the risk upon them is declared to commence: hence, in common policies on *goods*, the commencement of the risk is generally alleged thus: "*That heretofore, to wit,* (on some day about the time of loading,) *divers goods of great value had been and were shipped and loaded on board the said ship at* [the terminus à

(*p*) Strong v. Rule, 3 Bingham 315. See Stewart v. Wilson, 12 Mees. & Wels. further as to what in such policies shall 11,
be considered as conditions precedent, (*q*) Dalgleish v. Brooke, 15 East, 275.
Harrison v. Douglas, 3 Ad. & Ell. 396. (*r*) Rucker v. Greene, 15 East, 208.

*quo of the voyage insured, or other port where, by the policy, the risk on the goods is made to commence (s)] *aforesaid, in and on board the said ship or vessel in the said policy of insurance mentioned to be carried and conveyed therein on the said voyage.*"

Averment of commencement of risk.

*1263

This allegation, it will be observed, involves two propositions: 1. That the goods were shipped on board the vessel named in the policy, at the port, where, by the policy, the risk was to commence; 2. That they were so shipped in order to be carried to the port of destination, or terminus *ad quem* of the voyage insured.

This allegation involves two points.

Accordingly we shall find that since the New Rules of Pleading each of these two allegations may be made the subject of a separate traverse.

In policies on *ship* which are generally "*at and from*" either the home, or some out, port of departure, the usual allegation of the commencement of the risk is, "*that heretofore, to wit, on, &c., the said ship or vessel in the said policy of insurance mentioned was in good safety at [the port at and from which she is insured by the policy] aforesaid.*"

Mode of stating commencement of risk on policies upon *ship*.

In policies on *freight*, supposing the loss to have taken place after the whole cargo from which the freight is to accrue has been shipped on board, the averment is the same as in a common policy on goods; except that, instead of merely alleging that the goods were shipped and loaded on board the ship, it should be added that they were so shipped and loaded "*to be carried and conveyed on freight in and on board the said ship or vessel on the said voyage.*" (t)

Mode of statement in policies on *freight*, where all the cargo is on board at time of loss.

If the loss occurred before the whole of the goods were shipped on board, but after they were contracted for and ready to be so shipped, the averment should be "*that the said ship was in good safety at [the port of shipment], and that whilst the ship was at [the port of shipment] aforesaid, and before and at the time of the loss hereinafter mentioned, divers goods and merchandises amounting to a full cargo of the said ship which had been bought, procured, and contracted for, for and on account of the said person so interested in the subject matter of insurance as aforesaid, were there, to wit, at*

Where it is only contracted for, but not actually shipped at time of loss.

*1264

(s) This allegation must be very carefully attended to. *De Symonds v. Shedden*, 2 Bos. & Pull. 153.

(t) 2 Chitt. Pl. 105, 6th ed.

Averment of commencement of risk.

[the port of shipment] *aforesaid, for the purpose of being shipped and loaded, and which, if it had not been for the loss hereinafter mentioned, would have been shipped and loaded in and on board the said ship to be conveyed therein on the said voyage in the said policy of insurance mentioned, to wit from ——— to ———.*" (u)

ART. 4. *Averment of Interest.*

The New Rules of Pleading allow interest to be averred *alternatively*.

§ 438. Formerly the greatest care was required in averring the interest to be in the persons really interested in the subject of insurance: and to avoid the danger of a variance in this respect between the declaration and the proof, the interest, in all cases of doubt, was variously stated in different counts.

When the New Rules of Pleading prohibited more than one count on the policy, they, in order to meet the difficulty as to the statement of the interest, provided that, "in actions on policies of insurance the interest of the assured may be averred thus: that A., B., C., and D., or *some*, or *one*, of them, were, or was, interested, &c. And it may also be averred, 'that the insurance was made for the use and benefit, and on the account, of the person or persons so interested.'"

This mode of averment should always be adopted where there is a doubt as to the parties interested.

Declaration must always contain some averment.

1265*

Wherever, therefore, there is a doubt as to the persons in whom the insurable interest is vested, this alternative mode of allegation ought to be adopted.

In all cases it is necessary that the declaration should *contain some averment of interest*: this point was for some time considered doubtful (v)¹; and the Court of King's Bench even decided that, if the declaration showed that the ship insured **was, from the commencement of the risk to the time of loss, a foreign ship*, and, therefore, not within the prohibition of the statute against wager policies (19 G. 2. c. 37.), this dispensed with any averment of interest (w); but this decision

(u) See this averment in *De Vaux v. 13. Kellner v. Le Mesurier*, 4 East, 396. *J'Ansen*, 3 Bingh. N. C. 519.

(w) *Nantes v. Cousins*, 2 East, 385.

(v) *Crawford v. Hunter*, 8 T. Rep.

¹ See *Buchanan v. Ocean Ins. Co.* 6 Cowen, 318; *Clendinning v. Church*, 2 Caines, 144.

was overruled in the Court of Exchequer Chamber, and the law established to be, that, in declaring on all policies in the common form, (*i. e.* not purporting on the face of them to be wagers,) whether effected on British or foreign ships, the declaration must aver in whom the interest is vested. (*x*)

Averment of interest.

With regard, indeed, to *wager policies on foreign ships*, (*i. e.* to policies containing clauses on the face of them denoting proof of interest to be unnecessary, as "interest or no interest," or "without further proof of interest than the policy,") the declaration need not aver interest, but must show that, *from the commencement of the risk to the time of the loss*, the ship insured was not British. (*y*)

Except on wager policies on foreign ships.

The averment of interest in the declaration follows immediately after the allegation of the *commencement of the risk*, and is generally as follows: "*that the said E. F. (or "the plaintiff," or "that A., B., C., and D., or some, or one, of them") was then, (i. e. at the commencement of the risk,) and from thence continually afterwards until, and at, the time of the loss, hereinafter mentioned, interested in [the subject of insurance, whatever it may be,] to a large value and amount, to wit, to the value and amount of all the moneys by him ever insured or caused to be insured thereon [or in a valued policy "to the value in the said policy mentioned.]*"

General mode of averring the interest.

The two important points in this allegation are, the *time* at which the interest is averred to have vested, and the *parties* in whom it is vested.

The time and the parties are the important points in the allegation.

1. With regard to the time: in the form above given, the interest is averred to continue from the *commencement of the risk* until the loss. The material part, however, of the allegation is, that the interest was vested *during the risk* and *at the time of loss*.

As to time, the material averment is, that the interest was vested "*during the risk and at the time of loss.*"

* 1266

In one case, indeed, where the interest was averred to be in A. and B. *until, and at, the time of loss*, and it appeared that, *after the making of the policy*, but before the loss, C. had also become interested as a part owner, Mr. J. Buller refused to nonsuit on this evidence, saying, that *the making of the policy* was the time to which the averment of interest related. (*z*) But this doctrine is now exploded (*a*); and it

The making of the policy is not the time to which the averment of interest relates.

(*x*) *Cousins v. Nanters*, 3 Taunt. 512. (A. D. 1811.)

(*y*) *Ibid.*

(*z*) *Perchard v. Whitmore*, note of N. P. Cases, cited 2 Bos. & Pull. 155. note.

(*a*) *Powles v. Innes*, 11 Mees. & Wels. 10. *Sutherland v. Pratt*, *ibid.* 296.

Averment of interest.

Allegation that interest was subsisting at time of loss is material, and must be proved as laid: allegation that three part owners of ship were interested during risk and at time of loss; proof that one of three had, before loss, assigned away his interest: judgment for defendant. *Powles v. Innes*, 11 M. & Wels. 10.

is clearly settled that in no case is it requisite to allege that the party was interested at the *time of making the policy*, but that it is sufficient to aver that he was interested at the commencement of the risk (*b*), or, which seems quite enough, *during the risk and at the time of loss*. (*c*)

The allegation that the interest continued *until the time of loss* is material, that is to say, a party who, having been interested in the subject of insurance at the time of making the policy, has assigned away his share of the interest therein *before the loss*, cannot sue on the policy, except, indeed, as a trustee for the party to whom he has so assigned his interest, in cases where the policy is handed over to him on such assignment, or there is an agreement that it shall be kept alive for his benefit.

In the case that establishes this position, the declaration stated that the plaintiffs made the policy as agents for Page and Chamberlain; that Page, Chamberlain, and one Banks were, *during the risk, and until, and at, the time of loss*, interested in the ship to the amount of the money insured; and that the ship was *totally* lost. By his fourth plea the defendant traversed the allegation that Chamberlain, Page, and Banks were interested, during the risk, *modo et formâ*.

The proof was that, *at the time of effecting the insurance*, Chamberlain, Page, and Banks were each interested in one *third of the ship; but that, *before the loss*, Page, by bill of sale, had conveyed his share to Banks.

The court, on this evidence, gave judgment for the defendant. (*d*)

In some cases even the averment of interest *at the time of loss* may become immaterial.

Thus, where, under a policy on goods "*lost or not lost*," the plaintiff seeks to recover for an *average loss on the goods* it is no answer to an action on *such a policy*, that the partial damage in respect of which he sues had been sustained by the goods before he acquired any interest in them.

The declaration in the case now referred to, after setting out the policy, and alleging the shipment of the goods on a certain day, averred the interest thus: "that the plaintiff was, *during the said voyage, to wit*, on the same day and year

But on policies "lost or not lost," it is enough to aver that the plaintiff was interested *during the voyage*: and it need not be alleged or proved that policy was made, or that his interest had vested before loss. *Sutherland v. Pratt*, 11 M. & Wels. 296. Mode of averment in such case.

(*b*) *Rhind v. Wilkinson*, 2 Taunt. 237. (*d*) *Powles v. Innes*, 11 Mee. & Wels. 10.
(*c*) *Powles v. Innes*, 11 Mee. & Wels. 10.
10. *Sutherland v. Pratt*, *ibid.* 296.

last aforesaid, interested in the said goods to the amount insured;” and then stated a partial loss on the goods by sea damage.

Averment of interest.

The eighth plea, after admitting that the plaintiff had acquired an interest in the goods in *the course of the voyage*, nevertheless averred that the goods were damaged, as in the declaration mentioned, “*before the plaintiff acquired or had any interest therein.*”

On general demurrer this plea was held bad, on the ground that it is no answer to an action on a policy on goods lost or not lost, that the interest in them was not acquired till after the loss: such a policy being clearly a contract of indemnity against all *past* as well as all *future* losses sustained by the assured in respect to the interest insured. (e)

4 430. With regard to the parties in whom the interest is averred, the case of *Powles v. Innes*, just cited, will show what precision is required on this point, even since the New Rules, where the alternative form of allegation, given by the rules, is not adopted.

Where the alternative allegation given by the New Rules is not adopted, interest must be accurately averred and proved as laid. * 1268

*The following points, therefore, are still of importance when the interest is not alternatively alleged.

It was once considered that an averment in the declaration, that one or more parties were interested in the subject insured did not imply that they were *exclusively* interested; and consequently, though it came out in proof that other parties also were *jointly* interested with them, this was no variance. (f)

Formerly it was considered not necessary to aver interest in all joint owners; but now the rule is (except where the interest is averred in the alternative) that parties jointly interested can only recover on a count averring interest in all. Reason of the rule.

Subsequently, the courts were of opinion that the underwriter ought to be truly informed by the record for whose interest and on whose behalf the policy was really made. “The parties interested,” said Lord Ellenborough, “are so far looked upon as parties to the suit, that the declarations of any of them are admissible as evidence against the plaintiff; and what would be a defence against them is in many instances a defence against the plaintiff;” nay, as Sir Vicary Gibbs puts it in the case of *Cotton v. Hannam*, “a party interested might even be on the jury without the defendants

(e) *Sutherland v. Pratt*, 11 Moes. & S. C. 3 Esp. 185. See to the same effect, the N. P. case of *Hiscox v. Barrett*, 10 Wils. 285.

(f) *Page v. Fry*, 2 Bos. & Pull. 240. See C. J. Lea, cited 16 East, 145.

Averment of
interest.

having an opportunity of challenging him, unless truly informed by the record of the parties really interested." ¹

Upon these considerations the former decisions have been overruled, and the law clearly established to be, that parties jointly interested in property insured for their joint use and on their joint account, cannot recover upon a count on the policy averring the interest to be in one of them only. (g)

Where, however, one party alone is interested, he alone may sue, though policy effected in names of several.

1269 *

Policies effected with the usual clause, "in the name or names of all and every other person or persons to whom the same does, may, or shall appertain," extend to all parties interested in the thing insured at the time of effecting the policy, and whose interests the jury are of opinion it was intended to protect. *Carruthers v. Shedden*, 6 Taunt. 14.

It is not necessary, however, because the policy is effected in the names of several, that all should join in bringing the action, or that the declaration should aver an interest in all: the action may be in the name of one, the interest may be averred in him alone, and if he prove a sole interest in himself, there will be no objection to his recovery. (h) ²

*It should be observed, that the clause "for the benefit of whom it may concern," or "in the name and names of all and every other person or persons to whom the same does, may, or shall appertain," is not confined, in point of construction, to the party giving the order for the policy and causing it to be effected, but extends to all other parties who had an interest in the thing insured at the time of effecting the policy, and down to the time of the loss, and whose interest in such policy, in the opinion of the jury, was bona fide intended to protect. ³ A policy was effected by the plaintiff, as agent, in the usual form, "by order and on account of Dowick and Co.," and the declaration averred interest in Dowick and Way; the proof was, that though Dowick and Way were the sole members of the firm of Dowick and Co., yet that that firm were jointly interested with other parties in the

(g) *Bell v. Ainsley*, 15 East, 141, preferable decision; < *Graves v. Boston*, where Lord Ellenborough is held to show *Mar. Ins. Co. 2 Cranch, 419. Calkett* that he was not overruling *Page v. Fry*, *v. Pacific Ins. Co. 1 Paine C. C. 395.* But see *Cohen v. Hingham*, 5 Taunt. 101, and see, since the New Rules, *Postlethwaite v. Express*, expressly overrules *Page v. Fry*, *James, 11 Moes. & Wels. 10.* *See* and confirms *Bell v. Ainsley* as the *(h) Marsh v. Robinson, 4 Esp. 97.*

* See *Rider v. Ocean Ins. Co.* 20 Pick. 283, cited *ante*, 1257, in note, and 289, in note.

¹ See *Blanchard v. Dyer*, 21 Maine, 111, cited *ante*, 1236, in note. Where a policy is effected by R. for whom it may concern, being intended to cover his own interest and that of two others, and, after a loss, the others assign to him their interest, in an action on the policy, he should, in stating the interest, set forth these facts, and that the action is brought for his own benefit. *Rider v. Ocean Ins. Co.* 20 Pick. 282.

² *Ante*, 169, in note.

goods, which were the subject of the insurance; it being objected that plaintiff could only recover to the extent of the interest of *Dowick and Way*, the court overruled the objection, and told the jury to consider whether, under the term "*Dowick and Co.*," the policy had been intended to comprehend all the parties interested in the goods, or only *Dowick and Way*: the jury being of opinion that the former was the true construction, the plaintiff had a verdict for the full amount, which the court, on a motion for a new trial, refused to disturb, holding that the interest of the different parties need not appear on the *policy*, and observing also, that, at all events, *Dowick and Way*, as consignees of the whole cargo, had an insurable interest thereon to the full amount. (i)

Averment of interest.

On the same principle, where two valued policies had been effected with different sets of underwriters by the mortgagee of a ship, Lord Tenterden told the jury to take into their consideration, whether, at the time of effecting such policy, the assured had intended thereby to protect only his own interest in the ship, or that of the mortgagor also: the jury, upon the evidence, being of opinion that the former was the *case, the court would not allow him to retain the amount which he had received on both policies, such amount exceeding the sum at which the ship was valued on each, and also his interest as mortgagor. (j)

Irving v. Richardson, 2 B. & Ad. 193.

*1270

The same doctrine prevails in the United States, and has been illustrated there by various cases collected by Mr. Phillips. (k) In all cases of this kind the safe practical rule for the pleader will be to adopt the alternative mode of allegation permitted by the New Rules.

It should be observed, that though the names of the parties interested (except where stated in the alternative) must be correctly set forth, yet it never was held necessary to state the *nature* of the *interest* on the face of the declaration, by showing specially either the title in respect of which the action is brought (as that of mortgagor, vendee, consignee, &c.) or the mode in which the interest was acquired. Thus, in the

The nature of the interest, as of consignee, owner, mortgagee, &c., need never be set out.

(i) *Carruthers v. Shedden*, 1 Marsh. Rep. 416. 6 Taunt. 14. (k) 1 Phillips on Ins. 152-156. { *Anse*, 169, in note. }

(j) *Irving v. Richardson*, 2 B. & Ad. 193.

Averment of interest.

case of *Carruthers v. Shedden*, as it appeared that *Dowick and Way* had a clear insurable interest as owners in seven sixteenths of the goods, and also an insurable interest in the residue, as consignees, having a lien for advances: the court, on this ground, held that the averment of interest in them, to the whole amount insured, was sufficiently proved, and that their separate *kinds of interests* as owners of part, and consignees of the residue, need not be set forth. (l)

Averment of interest in different subjects of insurance.

§ 440. With respect to the mode of averring interest in different subjects of insurance, it may be observed, that in policies on *freight*, the declaration, after alleging the commencement of the risk by the loading of the goods on board the ship, "to be carried and conveyed on freight in and on board the said ship or vessel in the said voyage," avers the interest thus, that the plaintiff, "*then and from thence continually afterwards, until and at the time of the loss hereinafter mentioned, was interested in the said freight to be earned by the carriage *and conveyance of the said goods in and on board the said ship on the said voyage to a large amount, to wit, &c.*" (as in case of goods); or if no goods were really shipped on board, then state the commencement of the risk, as in the form already given from *Devaux v. J'Ansen*, and aver interest in the freight *during the risk and at the time of loss*.

Averment of interest in freight: where goods shipped on board at time of loss.

1271 *

Where only contracted for at that time.

Averment of interest in profits.

With regard to policies on *profit*, the averment may be either, that "during the risk and at the time of loss," the assured "was interested in the profits expected to arise from the said goods, &c. to a large amount, to wit, &c. (m); or "that whilst the said ship was prosecuting her said voyage, divers large quantities, to wit, &c. of goods, were loaded and shipped on board the said vessel, and continued so loaded on board thereof from thence until the loss hereinafter mentioned; and that the plaintiffs were interested in the profits to arise and be made from the sale and disposal of the said goods." (n)

Averment of interest in bottomry.

As to *bottomry*, the averment simply is, that the assured "was interested in the said bottomry to the full amount insured." (o)

(l) *Carruthers v. Shedden*, 6 Taunt. 14. See also *Irving v. Richardson*, 2 B. & Ad. 193.

(m) As in *Grant v. Parkinson*, cited 3 Bos. & Pull. 85.

(n) See form of declaration on policy on profit in *Stockdale v. Dunlop*, 6 Mees. & Wels. 224.

(o) *Simonds v. Hodgson*, 3 B. & Ad. 50.

The reader who wishes to see more at large the technical modes of stating various kinds of interest in different subjects of insurance, will find them in Chitty on Pleading. (p) Averment of interest.

ART. 5. *Allegation of Loss.*

§ 441. This allegation is important, and care must be taken that it is correct, both as to the *time* and as to the *cause* of loss. Mode of alleging time of loss.

As to the *time* of loss: in *voyage* policies, where the loss has taken place after the ship's sailing, the policy, after alleging the ship's departure from the terminus *a quo*, and her *sailing on her voyage, proceeds thus:— "*and that afterwards and whilst the said ship or vessel was proceeding on her said voyage, and before her arrival at [the terminus ad quem,] to wit, on [stating about the day on which the loss took place,] the said ship with the said goods, &c.*" was lost. In voyage policies. *1272

In time policies the loss is generally averred to have taken place, "*during the said time* [or during the said twelve calendar months," or as may be,] *and whilst the said ship was attempting to prosecute a voyage which was protected by the said policy, &c.*" to wit on, &c. (q) In time policies.

The material point is, that the declaration should show that the loss took place *during the risk*. (r) The material point is to show that the loss took place during the risk.

The time at which the loss took place should not be falsely stated, so as to mislead the defendant in the conduct of his defence.

Hence, where the declaration averred that the loss took place *after the vessel was loaded and had sailed on her voyage*; whereas it appeared that it had really taken place in port before the ship had sailed, and when she was only partly loaded: this was held to be a fatal variance, although the policy was "at and from," and so the loss was within the pendency of the risk. Time of loss should not be falsely stated, so as to mislead defendant in the conduct of his defence. Abitbol v. Bristow, 6 Taunt. 464.

Gibbs C. J. said, "this policy (which was on goods 'at and from Mogadore to London') embraces, as well losses happening at Mogadore, as losses occurring while the ship might be on her voyage home: but the two cases demand

(p) Vol. II. pp. 109–110, 6th ed.

(r) Sutherland v. Pratt, 11 Mees. &

(q) See Hollingsworth v. Brodrick, 7 Wels. 296. Hughes on Ins. 469. See also Peppin v. Solomon, 5 T. Rep. 496. Ad. & Ell. 40.

Allegation of
loss.

very different considerations. While the ship is on her voyage home she must be fully rigged, victualled, manned, and equipped; while at Mogadore she need have no other men on board than such as are necessary to prevent fire or the like accidents. The averment, therefore, of a loss *on the voyage*, would lead the underwriter to inquire whether her state at the time of loss was adapted to such voyage. Therefore, though both losses are within the policy, each requires a very different state of facts, and a different declaration." (s).

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As to the *cause*
of loss.
It must be care-
fully alleged
according to the
fact.

*§ 442. With regard to the *cause* of loss: great care must be taken in stating the cause of loss, to show that it arose either from some of the perils enumerated in the policy, or to state the circumstances of the loss specially, so that the court may be able to judge from the record, whether the loss, as alleged in the declaration, comes within the general or sweeping clause, at the end of the special enumeration in the policy of the disasters for which the underwriter agrees to be liable, — viz. "*all other perils, losses, and misfortunes, &c.*"¹

It must also be carefully borne in mind, as the leading rule on this subject, that when the loss is by the declaration alleged to have been caused by some *one* of the enumerated perils, such peril must appear on proof to have been the *proximate* cause of the loss, otherwise the allegation will not be supported.²

Whenever the
loss has been
proximately
caused by the
violent action
of the winds
and waves, it
may be alleged
as a loss by
perils of the
seas, though
remotely occa-
sioned by the
acts or negli-
gence of the
assured.

Whenever the loss, though *remotely occasioned* by some other cause, has been *immediately* and proximately caused by the violent action of the winds and waves, this will support the allegation of a loss by the *perils of the seas*.

Thus, where sugars were lost by the launch, in which they were being carried from the shore to the ship, being drifted ashore, and broken to pieces in the surf, owing to the crew, who had the care of her, all going to sleep (u): where a ship,

(s) *Abitbol v. Bristow*, 6 Taunt. 464. (u) *Walker v. Maitland*, 5 B. & Ald. S. C. 2 Marshall's Rep. 157.

¹ See *Ins. Co. v. Bland*, 9 Dana, 143. If a ship is not heard from for the time fixed by the policy, or for a reasonable period, she is presumed to be lost; and where the policy is against the usual risks, the presumption in such case is, that the ship was lost by the perils insured against; and the loss may be recovered under an averment of a loss by the perils of the seas. *Gordon v. Bowne*, 2 John. 159.

² See *ante*, 764 to 767, and in notes.

lashed to a quay by a rope, with which the mate had fastened her, fell over on her side when the tide left her, and was stove in, owing to the insufficiency of the rope (*v*): where a ship was driven on her beam ends by a squall of wind, and sunk, owing to the wilful (but not barratrous) misconduct of the master in heaving overboard too much ballast (*w*): where a timber-laden ship became leaky, and was obliged to be run on shore to prevent her from sinking, and was so much damaged, as to be obliged to be sold, owing to the unskilfulness of native Africans in loading her (*x*): — in all these cases, *as the loss, though remotely occasioned by the unskilfulness or negligence of the agents of the assured, was proximately caused by *the action of the winds and waves*, it was held to be rightly alleged in the declaration as a loss by the *perils of the seas*.

Allegation of loss.

*1274

Even though the remote occasion of the loss has been the *barratry* of the master and mariners, yet, if the immediately producing cause of the loss has been the agency of the winds and waves, (as, *e. g.* if the captain were barratrously to cut the ship's cables, and thereby let her drift on a lee shore, and become wrecked,) this loss, though it might never have happened but for the barratry of the captain, yet, having been the immediate result of the action of the sea, may be alleged as caused by the perils of the seas. (*y*)

This is so even where it has been remotely occasioned by barratry of the master and mariners.

Since the New Rules, which strictly prohibit more than one count on policies of insurance, and therefore preclude the possibility of varying the statement of the cause of loss, the courts would, no doubt, be far more disposed to extend than to narrow the principle established by the cases just referred to. In one case, since the New Rules, the Court of Exchequer refused to allow two counts, one alleging the loss by barratry, and another by perils of the seas: although the affidavit stated, that the alleged ground for resisting the payment of the loss was, that the ship had been wilfully lost abroad (off Borneo) by arrangement and conspiracy between the master and super-cargo, and that, owing to the absence of witnesses abroad, plaintiffs were unable to ascertain whether

Since the New Rules, two counts cannot stand together, one alleging the loss to have been by barratry, and the other by perils of the seas.

(*v*) *Bishop v. Pentland*, 7 B. & Cr. 219.

(*x*) *Redman v. Wilson*, 14 Mees. &

(*w*) *Dixon v. Sadler*, 5 Mees. & Wels. Wels. 476.

405. S. C. in error, 8 Mees. & Wels. 895.

(*y*) *Heyman v. Parish*, 2 Camp. 140.

Allegation of loss.

Where loss proximately caused by barratry, it must be alleged as a loss by barratry: *Alister*, where only occasioned thereby.

1275 *

Practically, wherever loss is clearly a loss by perils of the seas, it should be so alleged in pleading.

such was the case, or not. The court directed, that one of the counts should be struck out, observing, at the same time, that this was no hardship on the plaintiff, as he might recover on the count, alleging loss *by the perils of the seas*, notwithstanding the previous barratry. (z)

Of course, this rule only applies to cases in which the loss was *the direct effect of the action of sea perils*; e. g. to cases of barratrous *running ashore*, or *sinking by boring holes in the ship's bottom*, &c.: it would not apply to cases of fraudulent sale, or barratrously contrived *capture*. In this latter case, capture being one of the enumerated perils, an allegation of a loss by capture is sustained by proof of the ship's being taken by the enemy, in consequence of a plan preconceived with the master. (a)

Instead of repeating here the cases which we have already referred to at some length elsewhere (b), it will be better to direct the reader's attention to that portion of the work for a more extended illustration of the principles which regulate the mode in which the cause of loss ought to be alleged in the declaration.

Practically, it will be found, especially since the operation of the New Rules of Pleading, that the most advisable mode of alleging the cause of loss (except in cases where it has manifestly been the immediate result of other perils, such as capture, embargo, fire, barratrous sale, general average contribution, &c.) is to state it to have been by *perils of the sea*.

Thus, where a total loss took place, owing to the ship's having been driven by storms and sea-damage, into a port of distress for repairs, and sold there, from the impossibility of repairing her, except for more than her worth when repaired: — Chief Baron Pollock said, "it was to be regretted that the declaration (which set out the whole circumstances of the loss according to the facts) had departed from the simplicity of the old form of pleading, and that it would have been quite enough, in such case, to have alleged a total loss by perils of the seas." (c)

In order to meet the case, in which it may be held that

(z) *Blyth v. Shepherd*, 9 Mees. & Wels. 763.

(a) *Arcangelo v. Thompson*, 2 Camp. 620.

(b) See *ante*, Part III. Chap. II. Losses by the Perils insured against.

(c) *Parfitt v. Thompson*, 13 Mees. & Wels. 392.

the loss, as it appears in proof, is not a loss by perils of the seas, but is included within the general words, at the end of the enumeration of the specific perils insured against, it is allowable — and since the New Rules of Pleading seems advisable, in cases of doubt — to state the special circumstances *of the loss, according to the fact, and then add, “and the said ship afterwards, to wit, on &c., was, by perils and dangers of the seas, and by other perils, losses, and misfortunes insured against in the said policy, wholly lost, and never did arrive at — aforesaid. (d) ¹

Allegation of loss.

Where doubtful, whether it be not rather comprised under the general clause, “all other perils, losses, and misfortunes,” the cause of loss should be specially set out according to the facts.

* 1276

(d) *Redman v. Wilson*, 14 Mees. & 5 Bingh. N. C. 519. *Dixon v. Sadler*, 5 Wels. 478. See also *Phillips v. Barber*, Mees. & Wels. 405. *Young v. Turing*, 5 B. & Ald. 161. *De Vaux v. J'Ansen*, 2 Mann. & Gr. 523.

¹ See *Barnes v. Maryland Ins. Co.* 5 Harr. & John. 139.

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*CHAP. V.

OF THE CONSOLIDATION RULE.

Of the consoli-
dation rule.Reasons of the
practice.

§ 443. As the underwriters on common policies only bind themselves *severally*, *i. e.* each for the amount of his own subscription — as, in fact, each subscription makes a separate contract, — it is obvious that, at common law, and independently of any mode of procedure introduced, in order to modify the practice, the assured would have the right to bring a separate action against all the separate underwriters on the same policy, however numerous, in respect of the same loss and the same risk.

As however, in every policy, regarded as a contract of indemnity, there are *substantially* but two parties, namely, the assured on one side, and the whole body of underwriters on the other ; and as the claim to a loss on such policy must generally rest on the same grounds, when preferred against one of the underwriters, as when preferred against another ; it is obviously desirable, that in actions on policies, as in all other cases, a single trial should decide what is, in fact, but a single question.

Accordingly, in order to secure this result, Lord Mansfield introduced the practice of consolidating actions on policies of insurance.

Consolidation
rule.

The practice is this : where a number of actions are brought by the same plaintiff, upon the same policy, for the same loss, and on the same risk, against different underwriters, (or upon several policies, (a) the court, or a judge, upon application of the defendants, will, *with consent of plaintiff*, grant a rule or order to stay proceedings, in all the actions but one, the defendants in the other actions undertaking to

(a) *McGregor v. Horsfall*, 4 Mees. & Wels. 321. *Ohry v. Dunbar*, 6 Ad. & Ell. 824.

*be bound by the verdict in such action, and to pay the amount of their several subscriptions and costs, if plaintiff should recover, and the verdict be satisfactory to the court or to the judge before whom the trial took place: and the defendant, in the action tried, also undertaking, in such case, not to file a bill in equity, or bring a writ of error.

Of the consolidation rule.

* 1278

Beside these, the court, upon proper ground shown by the plaintiff, will impose any other terms on the defendants (to whom the rule is considered as an indulgence) that may be reasonable under the circumstances: as that they shall admit (and thus save the plaintiff the expense of proving) any fact upon which the question to be tried does not turn, or is not meant to be *seriously disputed*: that they shall permit depositions of witnesses to be read as evidence: that if money is paid into court in the action tried, it shall also be paid into court by the other defendants, &c. (b): the court, however, will not impose on the defendant any terms out of the ordinary course *without his consent*; but mere admissions of facts, which are not intended to be disputed, he may in all cases fairly be called on to make, as a condition of obtaining the rule.

Terms upon which the consolidation rule is granted.

The terms on which the parties ultimately agree should be incorporated into the rule on drawing it up. (c)

The leading principle which regulates all the decisions on this matter is, *that the order for consolidation is a favor asked by the defendants* (d): the courts, therefore, as a general rule, will not grant the order, except *by consent of plaintiff*.

Must be by consent of plaintiff.

Thus, where eleven actions, originally brought on the same policy, had been consolidated on the usual terms, that the ten should be stayed to abide the result of the eleventh, which, being tried, the defendant obtained a verdict, and the plaintiff then proceeded on the tenth, and obtained a verdict, *and was then proceeding in the other nine, when defendant obtained a rule, calling on plaintiff to show cause why the proceedings in the second of these nine should not be stayed,

Doyle v. Anderson, 1 Ad. & Ell. 635.

* 1279

(b) *Cohen v. Bulkley*, 5 Taunt. 164. Ad. & El. 649, note, and also in Chitty's *M'Gregor v. Horsfall*, 4 Mee. & Wels. Forms, p. 556.

(d) Per Parke, B. in *M'Gregor v. Horsfall*, 4 Mee. & Wels. 321.

(c) See a form of rule drawn up by consent in *Hollingsworth v. Brodrick*, 4

Of the consolidation rule.

upon the *submission of the plaintiff* and defendant in that action to be bound by the result of the first, the court refused to grant the rule as prayed, on the ground that they *could not compel the plaintiff to consent to the rule, nor grant it without his consent.* (e)

Hollingsworth v. Brodrick, 4 Ad. & Ell. 635.

In a subsequent case, where forty-eight actions having been brought by the same plaintiff on one policy against several defendants, an application was made to consolidate, which the plaintiff resisted, the same court, after consideration, said they thought the consolidation ought to take place, and a rule was accordingly drawn up by *consent.* (f)

Ohrlly v. Dunbar, 6 Ad. & Ell. 824.

In a later case in the same court, sixty-five actions having been brought by the same plaintiff on six different policies, an order for consolidation was drawn up "upon the *submission of the plaintiff* and the defendants," but no objection was taken to the form of the order, and the case turned on another point. (g)

In the latest case on the subject the former authorities were reviewed, and the Court of Exchequer acted on the principle of refusing to consolidate, at the instance of the defendants, without the consent of the plaintiffs.

McGregor v. Horsfall, 4 M. & Wels. 320.

In this case the order was drawn up, "*on submission of the plaintiff* and defendants, to consolidate two actions brought by the plaintiff on *two different policies* on the same ship. The plaintiff's counsel objected that such order could not be made without consent of the plaintiff, and insisted that the case of Hollingsworth v. Brodrick, which had been relied upon as having shaken the former rule on the subject, had *really no such effect, the decision of the court in that case amounting to no more than a recommendation that the consolidation should be made.

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Baron Parke, in the course of the argument, remarked, "*The order for consolidation is a favor asked by the defendants. Have you any precedent for binding the plaintiff against his consent?*" and the court ultimately made the rule abso-

(e) Doyle v. Anderson, 1 Ad. & Ell. 635.

(f) Hollingsworth v. Brodrick, 4 Ad. & Ell. 646. Three remarks are to be made on this case: 1st, it does not appear that this rule was moved for "*on the submission of the plaintiff*;" 2d, the principal

question before the court was, whether such rule could be granted before issue joined; 3d, it was finally drawn up by consent.

(g) Ohrlly v. Dunbar, 6 Ad. & Ell. 824. See *post*.

lute for rescinding the order as made, unless the defendants, in a week, agreed to the terms offered by the plaintiff. (*h*)

Of the consolidation rule.

If the order be drawn up "*on the submission of the plaintiff and defendants*," the courts, on application, will rescind it, unless defendants consent to reasonable terms. (*i*)

The effect of the rule, as far as concerns the defendants in the other actions, is, that they are bound by the verdict in the action tried; that is, supposing the verdict to be such a one as, in the opinion of the judge, before whom the action was tried, or of the Court in Banc, *ought to stand as a final determination of the cause*.

Effect of the rule.
Binds *defendants*, if verdict satisfactory.

If the verdict be not a satisfactory one, the courts will grant a new trial, and, in order not to conclude the other defendants unfairly, they will be disposed to grant new trials in actions on policies, when thus consolidated, upon less decisive grounds than in other cases. (*j*)

Aliter, if verdict be not satisfactory.

Where, however, a special jury had twice found a verdict for the plaintiff on a question of unseaworthiness, on the same evidence, the court refused to grant a second new trial (*k*): nor would they open the consolidation rule, and permit the same question to be retried, in another action, *against another underwriter on the same policy (*l*), Mr. J. Park declaring that, in all his experience, he never knew a consolidation rule opened after a second verdict. (*m*)

But court will not grant a second new trial; nor open the consolidation rule to permit the same question to be retried against another underwriter.

* 1281

The meaning of the usual condition, not to bring a writ of error, is that, after a fair trial, and substantial justice has been done, no writ of error shall be brought, though manifest error appear on the record: if, in such case, the defendant's attorney bring a writ of error, the court will grant an attachment against him for contempt. (*n*)

Meaning of the terms "not to bring writ of error," only applies to formal objections.

But where a case has been turned into a special verdict,

(*h*) *McGregor v. Horsfall*, 4 Mees. & Wels. 320. The terms offered were as follows: the plaintiffs to select which action they will try, the defendants in the action not tried agreeing to be bound by the verdict in the other, the plaintiff's interest to be admitted; if money paid into court in action tried, the same to be done in the other.

(*i*) See the case of *The Corporation of Saltash v. Jackman*, 13 L. J. N. S. Qu. B. 105, where the Court of Queen's Bench

refused, without the consent of plaintiff, to consolidate ten actions brought against ten *different* ship-owners, to try the same right, on ten *several* causes of action. S. C. 1 Dowl. & Lowndes, 851.

(*j*) *Hodgson v. Richardson*, 3 Burr. 1477. S. C. 1 W. Bl. 463.

(*k*) *Foster v. Steele*, 3 Bingh. N. C. 892.

(*l*) *Foster v. Alvez*. *Ibid.* 896.

(*m*) *Ibid.* 897.

(*n*) *Camden v. Edie*, 1 H. Bl. 21.

Of the consolidation rule.

Not to material points of law going to the merits of the case.

in order that defendant may remove it into the Exchequer Chamber, with a view of obtaining the decision of the Court of Error upon some material point of law going to the merits of the case, this is not against the terms of the rule; and the court, in such case, will stay execution in any other action commenced against another defendant on the same policy, he giving security to be bound by the determination of the Court of Error (*o*): and if the defendant in the first action have brought a writ of error, but having omitted to put in bail in error, plaintiff takes out execution as to him, yet he shall not be entitled to do so as to the other defendants, who may each bring their writ of error. (*p*)

Rule for a new trial is a stay of proceedings.

And in all cases alike, if plaintiff obtain a verdict, and the defendant apply for and obtain a new trial, proceedings will be stayed against the other defendants till the ultimate decision of the cause. (*q*)

Consolidation rule does not bind the plaintiff.

The rule being granted as a favor to the defendant, does not bind the plaintiff: accordingly, if a verdict passes in favor of the defendant at the first trial, on the ground of any variance between the declaration and the proof, or if fresh evidence have been subsequently discovered, the court will allow the plaintiff to open the consolidation rule and try one of the other causes included in the rule on an amended *declaration, and with the additional evidence (*r*): nor will they restrain him from bringing such second action till the costs of the first are paid. (*s*)

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Of the consolidation rule. When rule is opened on plaintiff's application, the court will extend the terms on which the first trial took place, to the subsequent actions.

If the plaintiff applies to the court for leave thus to open the rule, and proceed to trial with one or the other causes, the court, in granting his application, will generally extend to the second trial all such terms made compulsory on the defendant in the first, as may be required for "achieving the justice of the case."

Thus, where plaintiff having been defeated in his first action (the defendant in which had agreed to *permit the captain's deposition to be read in evidence upon the trial*) by a variance between the declaration and the proof, the court, on

(*o*) Gill v. Hineley, 1 Moore, 79.

(*r*) Cohen v. Bulkley, 5 Taunt. 165.

(*p*) Aylwin v. Favine, 2 Bos. & Pull. N. R. 430.

Doyle v. Douglas, 4 B. & Ad. 544.

(*o*) Doyle v. Douglas, 4 B. & Ad. 544.

(*q*) Hodgson v. Richardson, 3 Burr. 1477.

his application to open the rule, imposed it as a term on the defendant in the second trial, that it should be tried in like manner and with the like evidence. (t)

Of the consolidation rule.

Where, however, the plaintiff proceeds to trial of the second cause without having applied to the court, he cannot have the benefit of any terms which were imposed on defendants by the consolidation rule. (u)

Aliter, where plaintiff proceeds to try the second cause without such application.

Where several underwriters entered into a consolidation rule to abide by the determination of the Court in Banc, upon a point reserved for their consideration at the trial of a cause, — viz. as to whether a notice of abandonment had been given in due time, the court would not allow such rule to be opened on an affidavit stating that the owner had received letters from the captain abroad, informing him of the loss and sale of the ship before the arrival of the captain in London: the court said that notice should have been given to produce those letters at the trial, or they should, at all events have been adverted to by affidavit, when the court was moved on the point reserved. (v)

After entering into rule to abide by the determination of court on a point of law, such rule cannot be opened on affidavit of matters of fact, which might have been gone into at the trial. *Read v. Isaacs*, 6 Moore, 437.

* 1283

Where several underwriters to a policy had entered into a consolidation rule to abide the event of the verdict, and the cause at *Nisi Prius* was referred to an arbitrator to assess the damages, who awarded the aggregate sum due to the assured from the whole body of underwriters, the court would not, without consent of the underwriters, order it to be referred back to the arbitrator to insert the amount due from each underwriter individually. (w)

Cause tried under a consolidation rule, and referred to arbitration, cannot be referred back because arbitrator has only awarded an aggregate sum as damages. *Kynaston v. Liddell*, 8 Moore, 223. At what time applied for.

Formerly, before the New Rules of Pleading came into operation, consolidation was not granted *until after plea pleaded*: now, however, the practice is understood to be to consolidate at an earlier stage: thus, in one case, the court granted the rule to consolidate two actions on the same policy, where the application was made after a *declaration had been delivered* in the one, and an *appearance entered* in the other. (x)

Practical directions as to the mode of making the application will be found in the last edition of Archbold's Practice. (y)

(t) *Cohen v. Bulkley*, 5 Taunt. 164.

(w) *Kynaston v. Liddell*, 8 Moore, 223.

(u) *Long v. Douglas*, 4 B. & Ad. 545, note.

(x) *Hollingsworth v. Brodrick*, 4 Ad. & Ell. 646.

(v) *Read v. Isaacs*, 6 Moore. 437.

(y) Vol. ii. p. 1176, 8th ed.

Of the consolidation rule.

Costs on payment of money into court.

The rule of Hilary Term, 2 W. 4. c. 104. directs that "where money is paid into court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into court. (z)

(s) For the former practice, see Chitty's Archbold, vol. ii. p. 1188, ed. 1847.

*CHAP. VI.

*1284

CHANGE OF VENUE.

§ 444. The rule as to change of venue laid down by the Court of Exchequer, in the case of *Mondel v. Steele*, is, "that in all actions on contracts, though in writing, except on specialties, bills, and notes, the venue may be changed on the usual affidavit." (a)

Change of venue.

Rule of *Mondel v. Steele*, as to change of venue.

Mr. Marshall, therefore, appears to lay down the law, as to this point, with perfect accuracy, when he says, "If the venue in the declaration on a policy be laid in a wrong county, the court, upon motion, will change it to the county where the policy was made, unless it be *by deed*, in which case the court will not change the venue without some special ground being laid, to induce them to depart from the general rule." (b)

Rule as to policies of insurance as laid down by Mr. Marshall.

Of the authorities he cites for this position, that most to the purpose is the case of *Howarth v. Willett*, reported in *Strange*, where the venue of a declaration on a policy having been laid in Lancashire, *Strange* moved, on an affidavit, *that it was signed at Bristol*, to change the venue to Somersetshire: and the court only refused the application on the ground of the delay which would be caused by the change as proposed, the Spring assizes not being held at Bristol. (c)

Cases supporting this position.

In a case decided since the publication of the last edition of Mr. Marshall's work, the Court of Exchequer refused to change the venue in an action of *covenant* on a policy of insurance, the instrument *being under seal* (d); so that this case is no authority against the position laid down by Mr. Marshall. The real question appears to be, what is the *cause*

Changes of venue refused where action brought in *covenant*.

(a) *Per Parks, B. in Mondel v. Steele*, 8 Mees. & Wels. 641.

(b) *Marshall on Ins.* 701.

(c) *Howarth v. Willett*, 2 Str. 1180.

(d) *Smith v. Stanfield*, 1 M'Clelland & Young, 212.

Change of
venue.

*1285

**of action* in an action on a policy of insurance ? it is submitted that, as against the particular underwriter, who is the defendant in the action, the cause of action on the policy is *his subscription*, and consequently that the venue may be changed, where the policy is not under seal, to any county where such subscription was written. (e)

(e) In the case of *Howarth v. Willett*, to the policy seems assumed as the cause 2 Str. 1180, the signature or subscription of action.

*CHAP. VII.

*1286

OF THE PLEAS.

FORMERLY the only plea of frequent occurrence in actions on policies of insurance was the *general issue*, under which the defendant was enabled not only to dispute every fact alleged in the declaration, but also to give in evidence almost every matter — such as illegality, misrepresentation, change of voyage, deviation, breach of warranties, unseaworthiness, &c. — which went to disaffirm the contract, or to discharge the plaintiff's demand under it. (a)

Of the pleas.

Now, however, the New Rules of Pleading relating to this matter declare, 1. "That the plea of *non assumpsit* shall operate only as a *denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.*" (b) And, by way of example, they state, that in an action on a policy of insurance the plea will operate as a *denial of the fact of the subscription to the alleged policy* by the defendant; but not of the interest of the commencement of the risk, of the loss, or of the alleged compliance with warranties. The rule further provides, "That in every species of *assumpsit* *all matters in confession and avoidance, including not only those by way of discharge, but those also which show the transaction to be void, or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded.*"

New Rules of Pleading as to pleas on policies of insurance.

*And by way of instance, again, as far as relates to policies

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(a) Marshall on Ins. 701, 702.

(b) Reg. Gen. Hil. Term, 4 W. 4. Pleadings in particular actions; No. 1 *assumpsit*. — In *covenant or debt* (should the action on the policy be in either of those forms,) the rule declares, (No. 2,) that the plea of *non est factum* shall operate as *denial of the execution of the*

deed in point of fact only, and all other matters must be specially pleaded, including matters which make the deed *absolutely void*, as well as those which make it *voidable*. *Nunquam indebitatus* has the same operation as *non assumpsit*.

Of the pleas.

of insurance, the rule specifies, "*unseaworthiness, misrepresentation, concealment, and deviation*" as amongst those matters which must be specially pleaded.

We will consider briefly the decisions that have taken place both as regards the operation of the general issue, and the mode of pleading specially to actions on policies, since these rules were framed ; and then consider the subject of payment of money into court.

SECT. I. *Of the Operation of the General Issue as pleaded to Policies of Insurance since the New Rules.*

Non assumpsit to an action on a policy of insurance denies the making of the contract as alleged in the declaration.

A plea denying that the policy "was caused to be made as alleged in the declaration" is bad, as amounting to the general issue.

§ 445. When the rule gives as an illustration of the effect of non-assumpsit when pleaded to a policy of insurance, that it denies the subscription to the *alleged* policy by the defendant, it gives this merely as an example, and does not mean to confine the effect of the plea to a simple denial of *the fact of subscription* : at all events, it does not limit its effect to that of merely traversing the fact of the defendant's having subscribed the policy *on which the action is brought*, but of his having subscribed the *alleged* policy, that is, *such a policy as the plaintiff has set out in his declaration* : it denies, in fact, the *making of the contract declared upon*. Hence, if the declaration alleges that the policy was "*caused to be made by the plaintiff*," through the medium of certain policy brokers (in the usual form,) a plea traversing the fact that the policy was "*caused to be made by the plaintiff modo et formâ*" is bad, as amounting to the general issue ; for, as Baron Parke observed, non assumpsit, pleaded to such a declaration, "puts in issue not merely the subscription to a policy containing the particular terms alleged, *but to a policy caused to be made by the plaintiff and containing those terms.*" "A contract," contended his lordship, "imports that there are two parties to it ; *and a denial of the contract alleged is a denial of a contract with the plaintiff.*" (c)

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So a plea denying that parties actually effecting the policy had done so "as agents for the plaintiff."

*On the same ground, where it was alleged in the declaration that the parties actually effecting the policy had done so

(c) *Sutherland v. Pratt*, 11 Mees. & Wels. 296. See the observations of the learned judge, *ibid.* 314.

"as the agents for the plaintiff, and on his account, and for his use and benefit;" and that they were persons who had *received the order for, and effected, the policy* as his agents (in the common form under 28th G. 3. c. 56.) — a plea traversing this allegation *modo et formâ* was held bad, as amounting to the general issue. (d)

Operation of general issue.

Further, *non assumpsit* puts in issue the *consideration* given by the plaintiff for the defendant's promise, as well as the promise itself (e): now the consideration for the underwriter's promise is the *premium*: hence a plea denying that the plaintiff, or any one on his behalf, had *ever paid the premium*, or any part thereof, to the defendant *modo et formâ*, as alleged in the declaration, was held bad, as amounting to *non assumpsit*. (f)

So a plea denying payment of the premium.

By 11 G. 2. c. 30. s. 43, the London Exchange and the Royal Exchange Assurance Companies are allowed to plead *nil debet*, or *non est factum*, and thereunder give the special matter in evidence; and the plaintiff, upon issue joined on such pleas, may recover such damages as the jury may, on the evidence, think him entitled to.

London and Royal Exchange Assurance Companies are entitled to plead *non est factum* and *nil debet* by statute.

Since the Reg. Gen. Hil. T. 1 Vic., the words "by statute" must now be inserted in the margin of such plea. (g)

SECT. II. *Pleas in Denial — Traverses.*

§ 446. Of course it cannot be expected that any thing like a complete enumeration of the different pleas of this kind that have been adopted in practice since the New Rules can here be given: it will be sufficient to observe that, since those rules, every material fact alleged in the declaration which the defendant may desire to have the opportunity of contesting on the trial must be specifically traversed *modo et formâ*: a few of the pleas in denial of more ordinary occurrence in practice are here mentioned.

Pleas in denial. — Traverses.

Every material fact alleged in the declaration must be formally traversed, if meant to be disputed.

* 1289

1. *Denial that plaintiff was interested at the time of loss*: — As we have seen, the declaration must always contain an

1. Denial that plaintiff was interested at time of loss.

(d) *Redmond v. Smith*, 7 Mann. & Gr. 457.

(f) *Sutherland v. Pratt*, 11 Mees. & Wels. 296.

(e) *Bennion v. Davidson*, 3 Mees. & Wels. 179.

(g) See acc. *Hills v. London Ass. Comp.* 5 Mees. & Wels. 509.

Pleas in denial.
— *Traverse.*

Cases in which denial of interest, as alleged, is the proper mode of pleading.

Case in which no legal interest passed to plaintiff in the goods out of which the profits insured are to accrue.

Case where one of plaintiffs has assigned away his interest before loss.

That damage on goods has accrued before plaintiff was interested, is no answer on a policy, "lost or not lost."

1290 *

2. Denial, either that loss took place, as alleged, or by one of the risks insured against.

avement of interest; and if this is meant to be disputed, it must be traversed *modo et formâ* as alleged. (h) This is the proper mode of pleading when the defendant's case is, that the party or parties in whom the interest is alleged in the declaration either never had any insurable interest in the subject of insurance, or had parted with their interest before the loss.

Thus, where a declaration on a policy on *profits* alleged "that the plaintiffs were interested in the profits to arise and be made from the sale and disposal" of a quantity of palm oil: and the defendants case was, that, there having been only a verbal agreement for sale of the oil to the plaintiffs, they had no insurable interest in the profits to be derived therefrom — it was held that this defence was properly raised by a plea denying that plaintiffs were interested in the profits to be made by the sale of the oil *modo et formâ*. (i)

Again, where the declaration "alleged" that Page, Chamberlain, and Banks were, *during the risk, and until and at the time of loss*, interested in the ship to the amount insured; and the point of defence was, that Page, before the loss, had parted with his third share in the ship to Banks, and thereby put an end to his interest in the policy — this defence was given under a traverse "*that Chamberlain, Page, and Banks were interested in the ship during the risk, modo et formâ.*" (j)

To a declaration on a policy "lost or not lost," for an average loss on goods, it is no answer to plead that the goods were so damaged as alleged in the declaration *before the plaintiff acquired or had any interest in them*. (k)

*2. *Denial that Loss or Damage took place, as alleged, or was caused by any peril insured against:* — The defendant, as we have already seen, has a *good answer to the action*, if he can prove that the loss did not take place, as alleged in the declaration; *he frees himself from all liability on the policy*, if he can show that the cause of loss was not one of the perils

(h) *Mills v. Campbell*, 2 Y. & C. 389.

(i) *Stockdale v. Dunlop*, 6 Mees. & Wels. 224.

(j) *Powles v. Innes*, 11 Mees. & Wels. 10.

(k) *Sutherland v. Pratt*, 11 Mees. &

Wels. 296, 8th plea. For a general form of plea denying interest on goods at time of loss, see *Pearson* on Pl. p. 336; and see note as to the form of plea when the interest is laid "in A. B. C. or D. or some or one of them." *Ibid.* note (g).

insured against; accordingly, he may traverse either or both of these propositions, as may best suit the real nature of his defence.

Plea in denial.
— Traverses.

Thus, where the loss alleged in the declaration was that the ship was bilged, and rendered innavigable by the *breaking of tackle in getting her out of a dock where she had been repaired*, the defendants, under a traverse of the allegation of loss, *modo et formâ*, were allowed to contend that such a loss as described in the declaration was not comprised under the general and sweeping clause of the policy, "all other perils, losses, and misfortunes." (*l*)

Denial that loss was by a peril insured against, under the general sweeping clause, "all perils, losses, misfortunes, &c."

Where the declaration alleged a total loss "by perils and dangers of the seas, *and* other perils, losses, and misfortunes, insured against by the said policy," and the plea traversed this allegation *modo et formâ*, the defendant was allowed to contend under such plea, that the loss was the result, not of perils of the seas, nor any perils insured against; but of the negligent mode of loading the cargo. (*m*)

Evidence that loss arose from negligent loading may be given under this traverse.

It may be observed, that this defence can never be successfully established, when it appears (as will almost always be the case) that the *proximate cause* of loss was the perils of the sea.

In one case defendants, under a traverse that the ship was lost, *modo et formâ*, as alleged in the declaration, attempted to give evidence tending to show that the real cause of loss was *unseaworthiness*: but, as the seaworthiness of the ship had been admitted by an express clause in the policy, the jury were held to have been rightly directed to throw this evidence out of their consideration (*n*): as the New Rules expressly require that *unseaworthiness* should be specially pleaded, it would not, it is apprehended, be competent to the defendant to rely upon it in any case as a defence under a general traverse that the loss was caused as alleged. (*o*)

Query, whether defence that loss was caused by *unseaworthiness* can rightly be given under a general denial of the loss as alleged?

* 1291

3. *Denial that the Goods were loaded on board, &c.*: — If the policy, as is generally the case, expresses that the risk on goods is "to begin from the loading thereof on board the ship," such policy will only attach on goods loaded on board

3. Denial that goods were loaded on board *modo et formâ*.

(*l*) *De Vaux v. J'Ansen*, 5 Bingh. N. C. 519.

(*n*) *Parfitt v. Thompson*, 13 Mees. & Wels. 392. *Phillips v. Nairne*, 16 L. J.

(*m*) *Redman v. Wilson*, 14 Mees. & Wels. 476.

C. Pl. 194, S. P.

(*o*) See *ibid*.

Pleas in denial.
— *Traverses.*

at the *terminus à quo*, or port of loading, named in the policy : if it expresses that the risk is to begin "from the loading of them on board the ship at any named place," it will only attach on goods loaded on board *there*.

If the defendant's case is, that the goods were not thus loaded on board, he should deny the allegation in the policy that the goods were loaded on board *modo et formâ*.

Denial that they were loaded on board for the voyage.

If his case is, that though the goods were so loaded, yet they were not intended to be carried on to the port of destination, then he should deny that the goods were loaded on board *for the voyage*. (p)

Useful in actions on freight policies.

This mode of pleading will be found useful in policies on *freight*, when there is reason to believe either that none of the goods, or only part of the goods, were actually shipped on-board at time of loss. (q)

4. Denial (to a declaration on a freight policy) that any goods were contracted for, &c., at time of loss.

4. *Denial that any Goods were contracted for, &c., at time of Loss* : — Although none of the goods were actually shipped on board at the time of loss, yet, if at that time they were contracted for, and ready to be so shipped, the policy on the freight which is to arise from their carriage, attaches : if the defendant's case is, that there was no legal contract for the *goods at the time of loss, he may raise such defence under a denial, that goods at that time were procured or contracted for as alleged in the declaration. (r)

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5. Denial of compliance with express warranties.

5. *Denial of Compliance with Warranties* : — The declaration, as we have already seen, must allege compliance with every warranty expressed in the policy ; and the defendant was formerly permitted to give evidence of non-compliance under the general issue : there can now, however, be no doubt that, if he means to rely upon this defence, he must plead it specially in the form of a denial of the compliance with the warranty, as alleged in the declaration, *modo et formâ* ; for the New Rules, as to this point, expressly declare that non-assumpsit shall not operate as a denial "of the *alleged compliance with warranties*."

(p) See case in which both pleas were allowed together, *Reid v. Rew*, 2 Dowl. P. C. N. S. 543.

(q) As to the *law* where only part of the goods are put on board, *Forbes v.*

Aspinall, 13 East, 323. Where none put on board, but all contracted for, *De Vaux v. J'Ansen*, 5 Bingh. N. C. 519.

(r) See form of plea to this effect in *De Vaux v. J'Ansen*, 5 Bingh. N. C. 519.

If the defence be that the policy was made subject to a condition that has not been complied with, *and is not set out in the declaration*, the non-compliance with such condition should be pleaded in confession and avoidance. (s)

Pleas in denial.
— Traverses.

SECT. II. *Of Pleas in Confession and Avoidance.*

The cases of "*unseaworthiness, misrepresentation, concealment, and deviation*," pointed out by the rule, are only mentioned as illustrations, and by no means comprise every matter which must be specially pleaded, by way of confession and avoidance, to a policy of insurance.

Of pleas in confession and avoidance.

What defences must be pleaded by way of confession and avoidance.

We will select some instances from the course of English jurisprudence since these rules became imperative on the courts, in order to show the mode in which these defences ought to be framed, referring the reader for the forms, either to the reports themselves, or to works professedly devoted to the subject of pleading.

*ART. 1. *Plea of Unseaworthiness.*

*1293

§ 447. The implied warranty of seaworthiness relates, as we have elsewhere seen, even in a time policy, solely to the commencement of the risk: any plea, therefore, setting up as a defence unseaworthiness, accruing or caused in the course of the voyage, will be bad (as it seems) on general demurrer (t): the only exception, perhaps, being in those cases where it is necessary, for the safe navigation of the ship, that she should have a pilot in going out of any intermediate port in the course of the voyage, where pilots are kept and required to be taken on board, and she is lost in consequence of not taking one. (u)

Plea of unseaworthiness arising after the commencement of the risk is no defence.

To a declaration on a *time* policy, alleging a total loss by perils of the seas, the defendant pleaded, that *during the time*

Query, whether a plea alleging the loss to have

(s) See form of plea setting up as a defence that the insurance was made subject to a condition that ship was to be surveyed, and, if repairs found necessary on survey were not done, insurance was to cease. *Stewart v. Wilson*, 12 Mees. & Wels. 11.

(t) *Dixon v. Sadler*, 5 Mees. & Wels. 405. 8 Mees. & Wels. 895.

(u) See the observations of Patteson, J. in *Hollingsworth v. Brodrick*, 7 Ad. & Ell. 40. *Phillips v. Headlam*, 2 B. & Ad. 360.

Unseaworthiness.

been caused by unseaworthiness, owing to the gross negligence of plaintiff to repair, he having notice that repairs might be done at a small cost, compared to the ship's value when repaired — would be a good plea. *Seemle not.*

for which the ship was insured, and before the loss, the ship was damaged and unseaworthy ; but by reasonable care, and at small cost, compared with her value, she might and ought to have been by the plaintiff repaired and rendered seaworthy ; yet the plaintiff, " well knowing the premises," did not repair, &c., but she remained unseaworthy till the time of the loss : this plea was demurred to on the sole ground that it did not aver the *loss to have been caused by the neglect to repair :* and on that ground the court held it clearly bad ; but intimated also, that, even apart from this, it would, at all events, have been bad : 1. for not averring that the failure to repair was owing to *gross negligence* on the part of the plaintiff ; 2. for not showing with sufficient distinctness that the plaintiff knew the damaged state of the ship, and the possibility of repairing her at comparatively small cost. (v)

It appears, however, very doubtful, from the more recent cases, whether, even with these additional averments, the plea could have been supported, the effect of these cases *being, that unseaworthiness, arising after the commencement of the risk, though occasioned by the fault of the master, and distinctly shown to be the remote cause of loss, is no answer to an action, even on a time policy, where the proximate cause of loss is perils of the sea.¹

1294 *

A plea that loss was occasioned by unseaworthiness, arising from the wilful (but not barratrous) misconduct of the master during the period of the risk — is bad *non obstante veredicto.*

Thus, in an action on a time policy, in which the loss was alleged in the declaration to be by perils of the seas, the plea admitting the loss to be *caused* as laid in the declaration, averred it to have been *occasioned* by the wilful (but not barratrous) act of the master, in heaving ballast overboard *while the ship was at sea under the policy*, whereby she was rendered *unseaworthy*, &c. The replication traversed that the loss was so *occasioned* as alleged in the plea, *modo et formá :* a verdict having been entered for the *defendant* on this issue, the court, after argument, set it aside, and ordered judgment to be entered for the plaintiff, *non obstante veredicto*, on the ground that the plea was *bad in substance*, as the defence it substantially set up — viz. unseaworthiness, occasioned by the wilful misconduct (not amounting to barratry) of the plain-

(v) Hollingsworth v. Brodrick, 7 Ad. & Ell. 40.

¹ But see *ante*, 666 to 668, and in notes.

tiff's agents, after the commencement of the risk — was no answer to the action. (*w*)

Unseaworthiness.

The proper form of plea appears to be that given by Mr. Pearson (*x*), or that which was employed in the case of *De Vaux v. J'Ansen*, viz. "That the said ship was not, at the time of the commencement of the risk insured against by the said policy in the declaration mentioned, seaworthy," concluding with a verification. (*y*)

Proper form of plea.

In *Stewart v. Wilson* will be found the form of a plea which, *mutatis mutandis*, may be found practically useful, setting up as a defence, by way of confession and avoidance, that the plaintiff had not, after due notice, complied with an order by the managing underwriters of a mutual insurance association, to get certain stores and repairs which, in their judgment, they deemed necessary, and without which it was *provided, by one of the rules of the association, that the ship *should not be insured*: the issue raised was, whether the failure to provide such stores and repairs made the insurance void by the rules of the association; and the court held that it did, as the ship, without such stores and repairs, must be held unseaworthy, on the true construction of the rule. (*z*)¹

Plea of non-compliance with the orders of managing underwriters of an insurance association whereby ship, by the rules of the association, was unseaworthy.

* 1295

ART. 2. *Pleas of Misrepresentation and Concealment.*

§ 448. If the defence relied on be *misrepresentation*, the plea should state concisely — 1. The nature of the misrepresentation as actually made; 2. That defendant was induced thereby to subscribe the policy; 3. That plaintiff, at the time of making the representation, knew it to be false; and, 4. Made it with the fraudulent intent to deceive, &c. (*a*)

Substance of plea where the defence is *misrepresentation*.

(*w*) *Dixon v. Sadler*, 5 Mees. & Wels. 405, affirmed in error, 8 Mees. & Wels. 505, and followed in *Redman v. Wilson*, 14 Mees. & Wels. 476.

(*x*) *Pearson* on Pleading, 338. See also *Redman v. Wilson*, 14 Mees. & Wels. 476. See other forms in *Chitty's Pleading*.

(*y*) *De Vaux v. J'Ansen*, 5 Bingh. N. C. 519.

(*z*) *Stewart v. Wilson*, 12 Mees. & Wels. 11.

(*a*) See form in *Mackintosh v. Marshall*, 11 Mees. & Wels. 116.

¹ In reference to the form and mode of pleading under what is called the *rattem clause* in a policy, see *Brandagee v. National Ins. Co.* 20 John. 328; *Griswold v. National Ins. Co.* 3 Cowen, 96; *Rogers v. Niagara Ins. Co.* 2 Hall, 86.

Unseaworthi-
ness.

Where the de-
fence is conceal-
ment.

Reference to
the reports for
forms of pleas.

Where the defence is the *concealment* of a material fact, the plea should in substance allege — 1. The truth of the fact as it really was; 2. That such fact was *material* to the risk; 3. That it was within the knowledge of the plaintiff when he effected the policy; 4. That he wrongfully, improperly, and fraudulently, concealed it from the defendant. (b)

Pleas adapted to the following state of facts will be found in the Reports.

1. *Concealment* of time when a *missing* ship was last seen. (c)

2. *Concealment* of time when a missing ship sailed, and also positive *misrepresentation* as to the same fact. (d)

3. *Concealment* of the date of a bill for ship's disbursements drawn by the captain of a missing ship at her port of departure the day before she sailed. (e)

1296 * *ART. 3. *Plea of Deviation, Change of Risk, and Abandonment of the Voyage insured.*

"Deviation"
comprises every
change of risk.

§ 449. Under the general word deviation, as we have already seen, are comprised all those matters which discharge the underwriter by *varying the risk*.

Thus, not only deviation (in the more confined sense of the term,) but all unreasonable delay, unwarrantable trading, or other acts that *vary* the risk, must be specially pleaded: and so must the abandonment of the original voyage insured, either by giving up all thoughts of proceeding to the specified port of destination, or by engaging in an intermediate voyage inconsistent with the objects of the policy, though with an ultimate intention of afterwards proceeding to the *terminus ad quem*.

Form of plea
adapted to an
ordinary case of
deviation.

The form of plea given by Mr. Pearson seems well adapted to the case of an ordinary deviation, in the more proper and limited sense of that word. (f)

(b) See the observations of Mr. Baron Alderson in *Elkin v. Jansen*, 13 Mees. & Wels. 664. And see there Form of Plea.

(c) *Westbury v. Aberdeen*, 2 Mees. & Wels. 267.

(d) *Mackintosh v. Marshall*, 11 Mees. & Wels. 116. Both grounds of defence

were comprised in the same plea: query, whether on this ground it might not have been open to special demurrer.

(e) *Elkin v. Jansen*, 13 Mees. & Wels. 655. *This seems a carefully drawn and useful form mutatis mutandis.*

(f) Pearson on Pleading, 338, Form 7.

Forms will be found in the Reports adapted to the following states of facts :—

Deviation and change of risk.

1. Case in which a ship, insured for the African trade, with liberty to be employed *as a tender*, while out there, sailed away for *another port*, and also delayed thirteen months before commencing her homeward voyage, on which she was lost with her homeward cargo. The action was for a *total loss* of the homeward cargo by the perils of the seas : of the two material pleas, the third set up as a defence that there had been *an abandonment of the voyage*, and the fourth, that the ship had delayed *an unreasonable time*. (g)

The pleas in Hamilton v. Shedden.

2. Case in which goods, under a policy containing no liberty of transhipment, were, during the risk, and before the loss, transhipped into another vessel, whereby the risk was varied. (h)

Change of risk by transhipment.

* 1297

*If the case be that the voyage was changed *ab initio*, the plea should be that the ship sailed on a different voyage from that described in the policy.

Sailing on another voyage.

ART. 4. *Pleas that Risk had not commenced or had terminated before the Loss.*

§ 450. If the defence be that the risk has, under the circumstances, never commenced, or (what is the same thing) that the policy has never attached on the subject of insurance, this must be specially pleaded, not, however, by way of confession and avoidance, but by way of denial ; for though the declaration on the policy does not always contain any formal and explicit allegation to this effect, yet it is matter necessarily implied therein. (i)

Defence that the policy never attached must be specially pleaded, by way of denial.

A plea of this kind will frequently be found useful in policies on *freight*, in order to raise the question, whether the risk has attached, in cases where the loss takes place before all the goods are loaded on board. (j)

Such plea useful in policies on *Freight*.

Where, on the other hand, the defence is that the risk on

Defence that risk has terminated before loss should be in *confession and avoidance*.

(g) Hamilton v. Shedden, 3 Mees. & Wels. 50. See also a plea of unreasonable delay in Phillips v. Irving, 7 Mann. & Gr 325. (Case of *seeking* ship delaying nine months at Bombay *waiting for remunerative freights*.)

(h) Bold v. Rotherham, 15 L. J. Qu. B. 279.

(i) See as to this Stephen on Pl. 220, 4th ed.

(j) See accordingly De Vaux v. J'Anson, 5 Bingh. N. C. 519, where the second plea is of this kind.

Pleas that risk had not commenced or had terminated before loss.

the subject of insurance had terminated before the loss, this should be pleaded by way of confession and avoidance.

A form of plea to this effect will be found in the case of *Oliveron v. Brightman*, where the defence was, that the risk, under a policy on goods, had determined by the goods being landed before the loss at a place which had been substituted by agreement as the final port of destination in lieu of that originally intended. (*k*)

ART. 5. *Plea of Illegality.*

Illegality of voyage or trading must be specially pleaded.

1298 *

§ 451. Illegality of the trading, or voyage, must be specially pleaded by way of confession and avoidance: as to the mode of pleading when the illegality relied on consists in a contravention *to the express provisions of an act of parliament (see the case of *Redmond v. Smith*, in which it was held, that a non-compliance with the provisions of the Merchant Seamen's Act (5 & 6 W. 4. c. 19. s. 2.,) by not having a written agreement with the seamen, signed by the master, as required by the act, was not such an illegality as to make the contract of insurance void, and therefore that a plea alleging the voyage to be illegal on that ground was bad on general demurrer (*l*): a plea, under the second section of the Navigation Act of 3 & 4 W. 4. c. 54., was held bad on special demurrer, on the ground that the goods, whose importation was relied on as illegal under that section, were not amongst the enumerated articles, which are alone prohibited. (*m*)

ART. 6. *Pleading Usages of Trade, Customs of Lloyd's &c.*

Usages of trade and customs of Lloyd's must be specially pleaded.

Since the New Rules, any defence turning on the usages of trade, customs of Lloyd's, &c., must be specially pleaded. The following precedents in the Reports will be found of practical utility:—

Stewart v. Aberdeen, 4 M. & Wels. 211.

1. Pleas setting out the usage of Lloyd's as to settlement of losses in account, as between brokers and underwriters. (*n*)

(*k*) *Oliveron v. Brightman*, 15 L. J. Qu. B. 274, and note the form of replication there adopted. See ante.

(*m*) *Thompson v. Irving*, 7 Mees. & Wels. 367. See Form of Plea.

(*l*) *Redmond v. Smith*, 7 Man. & Gr. 457. See Form of Plea.

(*n*) *Stewart v. Aberdeen*, 4 Mees. & Wels. 211. A very useful form.

2. Pleas to a declaration by shipowners against underwriter for his proportion of a loss sustained in having to pay general average contribution on goods jettisoned, setting up a custom of London that the *owner of goods* carried on deck should not receive any contribution from the shipowner in case of their jettison; and also that the *underwriters on ship* should not be liable to make good any general average contribution paid by the shipowner under such circumstances. (o)

Usages and customs of Lloyd's.

Milward v. Hibbert, 3 Qn. B. 120.

Where the declaration alleged a custom of the particular trade, that goods of the kind jettisoned should be carried on deck, and the plea admitted such custom as alleged, but *denied that there was any custom to pay general average on such goods when so carried, this plea was held bad on special demurrer, as putting in issue a conclusion of law necessarily resulting from such custom, in fact, as was alleged in the declaration. (p)

Gould v. Oliver, 4 Bingh. N. C. 134.

* 1299

ART. 7. *Plea, in Cases of double Insurance, of Recovery under another Policy to the full Amount.*

§ 452. Formerly, under non-assumpsit, the defendant might show that plaintiff had already recovered to the full amount against the underwriters on another policy effected on the same interest, and for the same risk, and to whom the defendant had been compelled to pay a proportionable contribution on the sum by him insured: since the New Rules this defence must be specially pleaded. (q)

ART. 8. *Plea of Payment, or Accord and Satisfaction, by Settlement of Losses in Account, according to the Usage of Lloyd's.*

§ 453. We have elsewhere seen, when and under what limitations the settlement of a loss in account between the broker and underwriter, will be a defence to an action brought by the assured on the policy against the latter. (r)

Payment by settlement in account.
Statute of Limitations.

(o) Milward v. Hibbert, 3 Qn. B. 120. in the preparation of such plea from the

(p) Gould v. Oliver, 4 Bingh. N. C. case of Fink v. Masterman, 8 Mees. & Wels. 165.

2 Man. & Gr. 208. S. C. 2 Scott's N. (r) Part I. Chap. V. Sect. I. Art. 4, pp. 129-136.

R. 263. (q) The pleader may derive assistance

Plea of payment, or accord and satisfaction.

Where such settlement in account is set up by the underwriter as a defence, either as a payment, or as an accord and satisfaction, the custom must be fully set out in the plea, and the whole facts, as to the adjustment, &c. specially stated: a very useful precedent of both kinds of pleas will be found in the case of *Stewart v. Aberdeen*, in which evidence having been given of plaintiff's cognizance of the custom, the defence raised by the pleadings was held a good bar to the action. (s)

1300 *

* ART. 9. *Pleas of the Statute of Limitations, Tender and Set-off.*

Plea of the Statute of Limitations.

§ 454. The plea of the Statute of Limitations is in the same form in actions on policies as in other actions of assumpsit.

It was ruled by Lord Ellenborough, that where the master barratrously procured the ship to be condemned and sold in a vice-admiralty court abroad, the Statute of Limitations began to run on the policy in respect of the loss thus occasioned, from the time when the captain delivered up the ship and divested himself of the possession under the sale. (t)

Plea of tender.

Precisely the same rules that apply to the plea of tender generally, are applicable to it when pleaded to a policy of insurance. (u)

Where plaintiff has separate demands of unequal amount against several members of a mutual shipping association, of whom defendant is one, an offer of the whole sum due to him, including defendant's share, in full of all demands, will not sustain a plea of tender of defendant's share.
Strong v. Hervey, 3 Bingh. 304.

Thus, where the amount of the sum due from the defendant in an action on a policy for his contribution to the loss, as a member of an associated company of shipowners, was 3*l.* 2*s.* 9*d.*: it was held, that an offer made by the agent of all the shipowners to the plaintiff, to pay 400*l.* 11*s.* 1*d.* *in full* for his entire claim on the policy, did not support a plea that defendant had tendered the 3*l.* 2*s.* 9*d.*, although it appeared that the agent had explained to plaintiff's attorney that 3*l.* 2*s.* 9*d.*, part of the 400*l.* 11*s.* 1*d.*, was on account of defendant, and *in full* for plaintiff's demand against him; but it further appeared, that the party to whom the agent had made this representation, could not have taken the 3*l.* 2*s.*

(s) *Stewart v. Aberdeen*, 4 Mees. & Wels. 211.

(t) *Hibbert v. Martin*, 1 Camp. 539.

(u) See the general law as to pleas of

tender, very comprehensively and succinctly given by Mr. Pearson on Pl. vol. i. pp. 402, 403.

9d., for the agent said he tendered the 400l. 11s. 1d. in bank notes, and had no note of less than 10l. with him.

Tender and set-off.

The principles upon which this case was decided were : —

1. That an offer of a certain sum in full of a demand is not a legal tender. 2. That when a party has separate demands for unequal sums against several persons, an offer of one sum for the debts of all, will not support a plea stating that a certain portion of that sum was tendered for the debt of one. (v)

*1301

We have already seen that (except in cases of fraud) the underwriter is estopped by the acknowledgment in the policy, from setting up a claim for premiums against the assured himself. (w)¹

Plea of set-off. When underwriter can set off losses.

Consequently he cannot *set-off* such claim against an action brought by the assured on the policy for a loss.

But when the assured has been in the habit of himself effecting policies on his own account, *as his own broker*, and as such has for a length of time had a mutual account current with the underwriter, in which he has debited him for losses and returns of premium, and been debited in return by the underwriter for premiums; in that case, if such assured become bankrupt, and afterwards a loss happen, the underwriter may set-off against an action brought *by the assignees* to recover such loss, all the sums owing to him at the time of the bankruptcy from the assured, for premiums on all the different policies effected between them. (x)²

Graham v. Russell, 5 M. & Sel. 498.

ART. 10. *Plea of an Alien Enemy.*

§ 455. Before the New Rules, the defence that the party in whom the interest is averred in the declaration, was an alien enemy *at the time of effecting the insurance*, might be given under the general issue: now, however, there can be no

Alien enemy.

(v) Strong v. Hervey, 3 Bingham 304. 498. 2 Marshall's Rep. 561. 3 Price, (w) Dalzell v. Muir, 1 Camp. 532, and 227, S. C. overruling Glennie v. Edmunds, 4 Taunt. 775.

(x) Graham v. Russell, 5 Maule & Sel.

¹ But see ante, 112, and cases in note.

² See Baltimore Ins. Co. v. M'Fadon, 4 Harr. & John. 31; Wiggin v. American Ins. Co. 18 Pick. 158; Gourdon v. Ins. Co. of N. Amer. 3 Yeates, 327.

Plea of an alien
enemy.

doubt that this defence ought to be embodied in a special plea, concluding with a verification. (y)

Where, however, the party interested becomes an alien *after the insurance effected and after loss*, but before the commencement of the action, the alienage thus arising only suspends the right to sue during the war, and since the New Rules, as well as before, must be pleaded *in abatement*. (z)

1302 *

*SECT. III. *Payment of Money into Court.*

ART. 1. *When to be paid in — Form of Plea.*

When it is ad-
visable for the
underwriter to
pay money into
court.

§ 456. When the question is not whether the underwriters are liable to pay *any thing* to the assured, but *how much* they shall pay, it will be advisable for them to pay into court (if they have not tendered it before action brought,) the sum which, under all the circumstances, they conceive to be fully sufficient to satisfy every fair claim of the assured.

Under the 19 G. 2. c. 37. s. 7., if the plaintiff refuses to accept the sum so paid in, and proceeds to trial, and fails to obtain a verdict beyond such sum, he shall pay defendant the taxed costs of suit. (a)

When he should
bring in the
premium.

Whenever there is any reason to suppose from the facts, as known to the underwriters, that they may be enabled to show that the contract was *void, ab initio, or that the risk never, in fact, commenced*, e. g. if there be ground for pleading unseaworthiness, non-compliance with warranties, fraud, sailing on another voyage, or any other defence that wholly avoids the contract, or shows that the policy never attached, it is always advisable for the defendant to pay the premium into court, as, otherwise, the plaintiff, under the count for money had and received, will be entitled to a verdict for return of premium.

Mode of plead-
ing.

In both these cases the money must be paid into court under a plea, the form of which is given by Reg. Gen. Trin.

(y) 3 Chitt. Pl. 714, 6th ed. See a Flindt v. Waters, 15 East, 260. See 3 form in which the defence of alien enemy Chitt. Pl. 714, 6th ed.

was specially pleaded before the New Rules in *Cassares v. Bell*, 8 T. Rep. 166. (a) See now Reg. Hll. 4 W. 4, and Reg. Trin. 1 Vict.

(a) *Harmer v. Kingston*, 3 Camp. 153.

T. 1 Vict. (b): where the payment is made in respect of part of the amount claimed in the policy, the plea must be pleaded to the special count (c); where it is made in respect of a return of premium, it must be pleaded to the count for money had and received.

Payment of money into court.

***ART. 2. Effect of paying Money into Court as an Admission.**

***1303**

§ 457. Payment of money, *under the count on the policy*, relieves the plaintiff from the proof of the policy, and precludes the defendant from availing himself of any matter which goes to prove that the policy *as alleged in the declaration*, was either in law or in fact not executed; hence, he cannot object that it was not stamped, &c. (d)

Payment into court under the count on the policy, or generally admits the policy as declared on: therefore admits it to have been duly stamped.

The payment *admits the policy* AS DECLARED ON, and, therefore, precludes the defendant from offering any evidence to establish a variance between the statement and the proof.

Precludes defendant from relying on a variance between the statement and the proof.

Hence, where money was paid into court *generally* to a declaration, which, besides the common money counts, contained a special count on the policy, in which the risk on the ship was stated to continue till *she was unloaded*; Lord Ellenborough held that the defendant was precluded, by such payment into court, from offering evidence to show, that, by the original terms of the policy, as agreed to by the underwriters, the risk on the ship was only to continue "*for twenty-four hours after the ship was moored in good safety*," and that it was afterwards altered by the broker without their knowledge. (e)

So payment of money into court generally, or on the special count, admits the *interest to be in the parties in whom it is averred in the declaration*, and precludes the defendant from taking any objection on this ground (f): so it also admits the *loss to have taken place* as alleged: hence, when a loss was averred to be by perils of the seas, the defendant, who had paid money into court, was not permitted to show

Payment into court admits interest as alleged.

Admits loss as alleged.

(b) As to the form of this plea where the action is on *debt*, and damages are an important part of plaintiff's claim, see *Lowe v. Steele*, 2 Dowl. & Lowndes, 662. S. C. 15 L. J. Exch. 244.

(c) See form of plea so pleaded in *Stewart v. Steele*, 5 Scott's N. R. 927.

Powles v. Innes, 11 Mees. & Wels. 10. *Parfitt v. Thompson*, 13 Mees. & Wels. 392.

(d) Cases cited in *Lush's Practice*, 738.

(e) *Andrews v. Palegrave*, 9 East, 325.

(f) *Bell v. Ansley*, 16 East, 841.

Payment into court, effect as an admission.

But where loss as alleged may be referred to several causes, it does not admit it to have been caused by the particular risk on which plaintiff may choose to rely. *Everth v. Bell*, 7 Taunt. 449.

1304 *

Payment into court on the special count precludes defendant from going into any evidence to avoid the policy *in toto*.

As that party interested was not named in policy under 25 Geo. 3. c. 44. *Cox v. Parry*, 1 T. Rep. 464.

Or that ship was unseaworthy, or ac-

that it was occasioned solely by the plaintiff's improper stowage. (g)¹

But where the loss claimed in the action may, consistently with the terms of the declaration, be attributed to *several* causes, plea of payment into court does not admit that it was *in fact occasioned by any one of these causes in particular, upon which the plaintiff, in the conduct of his cause, may choose to rely.

Hence, where in an action on a policy on goods, "free of average," &c., the plaintiff averred in the special count that the ship, by force of the winds and waves, was *stranded*, bulged, damaged, and wrecked: and the defendant paid money into court generally *on the whole declaration*, including the common counts: Chief J. Gibbs held that this was not an admission that the loss took place by *stranding*, as the plaintiff, in order to entitle himself to recover for an average loss on the goods, insisted that it was: the loss, the Chief J. remarked, consistently with the declaration, might have been a general average, or, at all events, might have proceeded *from other causes than the stranding*, and therefore, the admission could not be exclusively confined to the stranding alone. (h)

The defendant, by payment into court on the special count, is precluded *from giving any evidence which goes to avoid the policy in toto*.

Thus, where the defence attempted to be set up was that the party interested was not named in the policy, whereby *it was void*, under the provisions of the 25 G. 3. c. 44. (since repealed, but then in force,) the court held that the defendant, by paying money into court, had precluded himself from taking that objection *as a ground of nonsuit*; because to the *extent of such payment* he had admitted that the plaintiffs were entitled to maintain an action on the policy. (i)

On the same ground, where it appeared that the defendant had paid money into court, under a count on a policy averring

(g) *Waldron v. Coombe*, 3 Taunt. 162.

(h) *Everth v. Bell*, 7 Taunt. 449.

(i) *Cox v. Parry*, 1 T. Rep. 464.

¹ See *Johnston v. Col. Ins. Co.* 7 John. 315; *Spaulding v. Vandercrook*, 2 Wendell, 431.

compliance with the rules of a mutual insurance society, of which he was sued as one of the members — he was held to be thereby precluded from insisting *upon a nonsuit*, on the ground, 1. That the ship was *unseaworthy*, under one of the rules of the society; and, 2. That the *action was prematurely brought*, under another of those rules. To the extent of his **payment* he had admitted that plaintiff had a ground of action on the policy: it lay upon him, therefore, to prove that a part of the sum recoverable under the policy could be claimed by the plaintiff, without the whole being due; and, in the absence of such proof, the objection was waived, on both grounds, as to the whole sum, though, but for the plea of payment, either ground would have been a cause of nonsuit. (*j*)

But it must be carefully borne in mind that this *admission operates only to the extent of the payment*.¹

By paying money into court, the defendant admits that the plaintiffs are entitled to maintain their action on the policy *to the amount of the sum so paid in*: but he admits nothing more.² He does not, by paying money into court, vary the construction and import of the policy, so as to entitle the plaintiffs to recover *beyond that extent*. (*k*)

The breach, in fact, on which the action is founded is so far from being admitted, by paying money into court, to the extent in which it is alleged in the declaration, that its extent, *i. e.* the question whether the plaintiff can or cannot claim more than the sum paid in (in technical language “*damages ultra*,”) is the very matter in issue. (*l*)

(*j*) *Harrison v. Douglas*, 3 Ad. & Ell. 306. In this case the money was paid into court on the count on the policy, which averred compliance with all the rules of the society, and also on the count for money had and received. (*k*) Per Ashurst, J. in *Cox v. Parry*, 1 T. Rep. 464. (*l*) *Lush's Practice*, 738. See *Cox v. Parry*, 1 T. Rep. 464.

Payment into court, effect as an admission.

tion prematurely brought under the rules of a mutual insurance society, whereof defendant was sued as member.

Harrison v. Douglas, 3 Ad. & Ell. 306.

* 1305

Payment of money into court only operates as an admission to the extent of the payment.

Payment into court, effect as an admission.

¹ *Donnell v. Columbian Ins. Co.* 2 Sumner, 366.

² So, where a verdict was taken against the defendants by consent, subject to the report of auditors, in order to ascertain the amount of the loss suffered by the plaintiffs, it was held, that the defendants, by this course, only admitted, that the plaintiffs had some cause of action, and did not preclude themselves from any inquiry into the cause and nature of the loss, and the amount, which was attributable to the perils insured against. *Donnell v. Columbian Ins. Co.* 2 Sumner, 366.

Payment into court, effect as an admission.

1306 *

What payment into court admits when pleaded to the indebitatus counts.

When taking money out of court operates as a waiver of plaintiff's claim.

Taking subsequent steps in the cause precludes plaintiff from relying on the payment as an admission.

Thus, in an action on a policy, where the declaration averred a *total loss by capture*, payment into court of 30 per cent. was held to admit that the loss was "*by capture* ; but not to be an admission of the *totality* of the loss, or of any thing being due in respect thereof beyond 30 per cent. on the value in the policy." (m) And in a subsequent case it was allowed to be the established rule, that payment into court does not admit *the amount of the damage* (n) : thus, where the premium had been paid into court *generally* upon a declaration containing a special count on the policy, and the money *counts, Lord Ellenborough held that this was merely an admission of the contract, leaving it open for the defendant to contend that he was not liable, beyond the amount paid in, for goods which were not loaded according to the terms of the policy. (o)

If pleaded to the indebitatus counts *alone*, payment into court amounts only to an admission that the defendant is liable, in respect of some one or more causes of action stated in those counts, *to the extent of the sum so paid in.* (p)

If the payment of money into court is, by the form of the plea, strictly confined to one of the counts, or sets of counts, of the declaration, it cannot be taken to operate as an admission of the cause of action in any other count : hence taking out of court money paid in under the indebitatus counts on a policy, would be no waiver of plaintiff's right to proceed on the special count. (q)

There is no doubt that plaintiff, by proceeding to take subsequent steps in the cause may waive his right to insist on the payment as an admission.

Thus, where defendant had paid into court the premium generally to the whole declaration, and afterwards proceeded to exhibit interrogatories, with the view of procuring evidence of fraud in effecting the policy, without any objection from

(m) *Rucker v. Palgrave*, 1 Taunt. 419. S. C. 1 Camp. 556.

(n) *Everth v. Bell*, 7 Taunt. 449.

(o) *Melish v. Allnutt*, 2 Maule & Sel. 106.

(p) See generally as to the effect of paying money into court on the indebitatus counts, *Taylor on Evidence*, vol. i. pp. 558, 559.

(q) So were more than one special count is allowed, as in actions on charter-parties, if plaintiff has introduced two counts setting up inconsistent grounds of claim, his taking out of court money paid into it on one of these counts, is not waiver of his right to proceed on the other. *Gould v. Oliver*, 2 Man. & Gr. 208. S. C. 2 Scott's N. R. 263.

the plaintiff, who, on the contrary, filed cross interrogatories to the same point, the plaintiff was not allowed afterwards to object at the trial that the defendant, by his payment into court, was precluded from setting up such defence to the action: in other words, the court held that the plaintiff, by the course he had taken, must be considered to have waived his right to take advantage of the admission implied from defendant's having paid money into court. (r)

Payment into courts, effect as an admission.

*The courts are not disposed to favor the doctrine of admission by payment of money into court; and will relieve the party, on the usual terms, from the consequences of any admission arising from a mistake in pleading: thus, where a defendant, by paying the premium into court generally, had precluded himself of a good defence he would otherwise have had to the action, he was allowed, on payment of costs, to amend his rule for paying money into court, by confining it to the common counts. (s)

*1307

Remedy in case of mistaken admission by payment of money into court on a special count.

SECT. IV. *Of pleading several Matters to actions on Policies, under Reg. Gen. Hil. T. 4 W. 4. § 26.*

§ 458. The following case is the only one I find reported on this subject; and, as it is a good illustration of the operation of the New Rules in this respect, I shall insert it at large.

The policy was on ship and goods for a voyage from Norway to South America, and was alleged by the declaration to have been effected by the plaintiffs for one N., in whom interest was averred.

The defendant proposed to plead the following sixteen pleas:—

1. That the policy was made by fraud. 2. That defendant's promise and subscription to the policy were obtained by fraud. 3. A traverse that the goods were loaded on board. 4. A denial that they were placed on board the ship to be carried on the voyage insured. 5. That goods were fraudulently overvalued in the policy. 6. A traverse that N. was interested in the ship. 7. A traverse of his interest in the goods. 8. Denial that policy was effected by plaintiffs as agents for N. (t) 9. Denial that ship ever sailed on

(r) *Muller v. Hartshorn*, 3 Bos. & Pull. 556.

(t) Bad, as amounting to non assumption. *Sutherland v. Pratt*, 11 Mees. &

(s) *Andrews v. Palgrave*, 9 East, 325. *Wels*, 296.

Pleading several matters.

the voyage. 10. Traverse of the loss of the *goods*. 11. Traverse of the loss of the *ship*. 12. That the goods were *fraudulently lost*. 13. That ship was fraudulently lost. 14. That a small and inconsiderable portion of the cargo only was put on board as a cloak and pretence for effecting a policy of insurance, and with the intent of defrauding the underwriters in the event of the loss of the ship. 15. That a small and inconsiderable portion only of the cargo was loaded on board, with the intent that it might appear to constitute a valuable cargo, and with the intent that it should be lost by fraud. 16. Deviation.

1308*

The Court of Exchequer, having been moved for leave to *plead the above several matters, after argument, held that the 1st, 2nd, 14th, and 15th pleas were substantially pleas of fraud, and as the subject matter of the three latter might be given in evidence under the 1st, they ought not to be allowed to be pleaded with it : the defendant must elect one of those four, but the other twelve pleas might be allowed. (u)

(u) *Reid v. Bew*, 2 Dowl. P. C. N. S. 543.

*CHAP. VIII.

* 1309

OF THE REPLICATION.

§ 459. WITH regard to the replication and subsequent proceedings, as they are mainly determined by the nature of the defence set up, and are not subject to any rules peculiarly applicable to actions on policies of insurance, it will not, in this place, be necessary to say much.¹ It may, however, be observed, that the replication *de injuriâ* is admissible in all actions of assumpsit on policies; the effect of so replying, in throwing upon the defendant the burden of proving all the material allegations of his plea, has been well shown in the case of *Elkin v. Jansen*, where, in answer to an action on the policy, the defence was set up that the plaintiff had been guilty of a material concealment in *not communicating* the date of a bill for ship's disbursements, drawn by the captain of a missing ship at her foreign port of departure, the day before she sailed thence. The plaintiff having replied *de injuriâ*, the Court of Exchequer held, that, on the issue thus raised, the defendant was bound to make *the negative fact of non-communication*; though as to this, they acknowledged that very slender evidence would suffice. (a)

Of the replication.

Replication *de injuriâ*.Burden of proof on the issue raised by replying *de injuriâ* to a plea of concealment.

(a) *Elkin v. Jansen*, 13 Mees. & Wels. 655; and see the observations of Mr. B. Alderson, pp. 654, 655.

¹ See *Griswold v. National Ins. Co.* 3 Cowen, 96.

FORM OF PLEADINGS IN ACTIONS NOT BROUGHT ON THE
POLICY, BUT ARISING OUT OF THE RELATIONS OF THE
PARTIES THERETO.

Form of pleadings in actions not brought on the policy, but arising out of the relations of the parties thereto.

Action by broker for premiums and commissions.

Actions by underwriter to recover back losses, &c.

Actions against policy broker for negligence.

§ 460. 1. ACTIONS *by broker for premiums and commissions.*

In suing the assured for premiums, if they have not been actually paid over by the broker to the underwriter, or there be any doubt as to the assured being cognizant of the usage at Lloyd's to take settlement on account as payments, the safer mode is, to declare, not simply as for "money paid," but for "money due for premiums caused and procured to be effected by the defendant." (a) *Commissions* may be recovered under a common count for work and labor (b), or for work and labor and commissions. (c)

2. *In actions by underwriter to recover back losses improperly paid, or the proceeds of salvage, after payment of total loss* — the proper form is the common count for money had and received (d); and the same remark applies where the action is brought by the broker to recover back a loss paid to (e), or passed in account with the assured (f), under a mistake of fact.

3. *Actions brought by the assured against the broker for negligence.* — The following precedents of declarations in such actions are here referred to as likely to be of practical utility: —

*a. *Case against an insurance broker for not effecting a*

(a) *Dalsell v. Muir*, 1 Camp. 532; and see especially *Power v. Butcher*, 10 B. & Cr. 329. See also as to the law *ante*, Part I. Chap. V. vol. i. pp. 137-139.

(b) *Power v. Butcher*, 10 B. & Cr. 329. As to commissions *del credere*, see *Carruthers v. Graham*, 14 East, 378.

(c) As in form, 2 Chitt. Pl. 55, 6th ed.

(d) *Bilbie v. Lumley*, 2 East, 469. *Roux v. Salvador*, 3 Bingh. N. C. 266.

(e) *Edgar v. Bumpstead*, 1 Camp. 411.

(f) *Jameson v. Swainstone*, 2 Camp.

proper alteration in policy, so as to cover a proposed alteration in the voyage. (*g*)

- b. Assumpsit* against an insurance broker for breach of implied contract, in not giving due notice to his employers of his failure to procure, on their terms, an insurance which they had specially instructed him to effect. (*h*)

Form of pleadings in actions not brought on the policy, but arising out of the relations of the parties thereto.

N. B. In this case the court held that the giving such notice is part of the duty implied from the undertaking to effect an insurance, and that an actual promise to give such notice, though averred in the declaration, need not be proved.

- c. Case* against policy broker for not procuring a stamped policy to be executed in reasonable time by an insurance company. (*i*)

- d.* In addition to these precedents, it may be useful to refer to a declaration in case against the secretary of an insurance company for false representation as to the affairs of the society, whereby plaintiff was induced to effect an insurance with the company. (*j*)

Case against secretary of insurance company for false representation.

4. Actions by shipowners or owners of goods against their co-adventurers for general average contribution. — The following precedents of declarations may be found useful: —

Actions by shipowners, or owners of goods, *inter se*, for general average contribution.

- a.* Action by shipowner against owner of goods for contribution in general average for sacrifice of tackle and expenses incurred in saving ship and cargo. (*k*)
- b.* Action by shipowner against owner of goods for ship's stores necessarily thrown overboard to save ship and cargo: action held to lie, though the jettison took place after ship was captured, and while she was in possession of the enemy. (*l*)
- c.* Action by owner of goods carried on deck against shipowner *for contribution by reason of their jettison, setting out a custom of trade to carry such goods on deck. (*m*)

* 1312

5. Action by shipowner, or owner of goods, against underwriter to recover proportionable share of sums paid in general

Actions by the same parties against the underwriters for reimbursement of sums paid in contribution.

(*g*) Chapman v. Walton, 10 Bingh. 57.

(*h*) Callender v. Osleichts, 5 Bingh. N. C. 58.

(*i*) Turpin v. Bilton, 5 Man. & Gr. 455.

(*j*) Pontifex v. Bingham, 3 Man. & Gr. 63.

(*k*) Birkley v. Presgrave, 1 East, 220.

(*l*) Price v. Noble, 4 Taunt. 123.

(*m*) Gould v. Oliver, 4 Bingh. N. C. 134. See also S. C. 2 Man. & Gr. 208. 2 Scott's N. R. 263.

Form of pleadings in actions not brought on the policy, but arising out of the relations of the parties thereto.

average contribution : when the action is brought against the underwriter, the policy must be set out in the declaration : a very instructive precedent, both of the declaration and the subsequent pleadings in such case, will be found in the report of *Milward v. Hibbert*. (n)

(n) *Milward v. Hibbert*, 3 Qu. B. 120.

*CHAP. X.

*1313

EVIDENCE AT THE TRIAL.

As the rules of evidence applicable to trials on policies of insurance do not vary from those which prevail in other cases, it is proposed only to notice such points of the law of evidence as are of frequent practical occurrence in actions on policies, referring the reader for more extended information to works more especially devoted to the consideration of this branch of the law. As far as relates to our present purpose, the subject of the present chapter may conveniently be divided as follows : —

Evidence at the trial.

SECT. I. Provinces of the court and jury in trials on policies of insurance.

SECT. II. Admissibility of parol evidence to explain policies.

SECT. III. Witnesses. — Effect of Lord Denman's act.

SECT. IV. Proof, admissibility, and effect of documents frequently adduced in trials on policies.

SECT. V. Proof of the making of the policy. — Agency, &c.

SECT. VI. Proof of the subscription of the policy. — Agency, &c.

SECT. VII. Proof of compliance with warranties.

SECT. VIII. Proof of interest.

SECT. IX. Proof of ship's sailing, and of the inception of the risk.

SECT. X. Proof of loss. — Variance.

SECT. XI. Evidence in defence.

SECT. I. *Provinces of the Court and Jury in Trials on Policies of Insurance.*

§ 461. A special jury of London merchants being, generally speaking, especially qualified to determine all questions

Questions relating to mercantile usages, and

Provinces of the court and jury in trials on policies of insurance.

meaning of mercantile terms are for the jury.

1314 *

Court takes judicial notice of established usages of trade.

Usages of particular trades, places, or classes, must be proved.

Whether parties to the policy are bound thereby is a mixed question of law and fact.

The construction of the policy is for the court : the meaning of technical or doubtful terms for the jury.

relating to mercantile usages and mercantile terms, such questions are generally left for their decision : with regard *to the custom of merchants, and the general and known usages of trade, the courts will take judicial notice of them, at all events, where they have been settled by a course of judicial determinations, in which case they are regarded as forming part of the law merchant. (a)

The usages, however, of a particular trade (b), or of a particular place, as the custom of Lloyd's (c), must be proved by parol evidence to the satisfaction of the jury :¹ the question, whether the parties to the contract must, from their place of residence, habits of business, or other circumstances, be taken to be cognizant of the usage of Lloyd's, is also for the jury (d) : and upon their finding, on this point, it will depend, whether the court hold the parties bound by the usage, or the reverse. It is, however, in all cases, for the court to decide whether evidence of usage is admissible : and the principle on which they proceed in determining this point is, that such *evidence is only admissible to explain what is doubtful, never to contradict what is plain.* (e)

The construction of the policy, when the meaning of its terms is ascertained, is for the court : but the interpretation to be put upon technical terms (f), the extension given by mercantile usage to descriptions of ports or places named in the policy (g), and the construction of peculiar, novel, or unusual clauses (h) is for the jury : in these cases it is for the jury to say what the *meaning of the expressions is* ;² but for the court to decide *what the meaning of the contract is.* (i)

(a) Barnett v. Brandao, 6 Man. & Gr. 630.

(b) Pelly v. Royal Exch. Comp. 1 Burr. 341. Noble v. Kennoway, Dougl. 510, &c. Milward v. Hibbert, 3 Qu. B. 120.

(c) Gabay v. Lloyd, 3 B. & Cr. 793. Lawrence v. Aberdeen, 5 B. & Ald. 107.

(d) Stewart v. Aberdeen, 4 Mees. & Wels. 211.

(e) Blackett v. Royal Exch. Ass. Comp.

2 Cr. & J. 244. Crofts v. Marshall, 7 C. & P. 597.

(f) Houghton v. Gilbert, 7 C. & P. 701.

(g) Constable v. Noble, 2 Taunt. 408. Cooke v. Atkinson, 3 B. & Ald. 400. Robertson v. Clarke, 1 Bingh. 445. Moxon v. Atkyns, 3 Camp. 190.

(h) Parr v. Anderson, 6 East, 207.

(i) Per Parke, B. in Hutchinson v. Bowker, 5 Mees. & Wels. 542.

¹ See M'Lanahan v. Universal Ins. Co. 1 Peters, (S. C.) 184.

² See Stebbins v. Globe Ins. Co. 2 Hall, 632.

The question of the materiality of a representation (*j*) or *concealment (*k*) are questions for the jury,¹ though the judge in such cases ought to take care that they are not misled by any thing that comes out in the evidence (*l*), and the court will grant a new trial, whenever they think the verdict against the weight of the evidence (*m*): the question whether a given ship was out of time on a given voyage, seems exclusively a question for the jury. (*n*)

Provinces of the court and jury in trials on policies of insurance.

Materiality of representation and concealment is for the jury.

* 1315

In cases of deviation, the question, as to what is the usual or prescribed course of the voyage insured, is, generally speaking, for the jury, and is to be made out by the evidence of mercantile men: when so ascertained, the question whether, upon the whole construction of the policy, and under all the circumstances of the case, there has been what amounts to a deviation, is for the court:² it is for the jury to say, whether a given voyage has been commenced or prosecuted within a reasonable time. (*o*)³

Deviation.

The question whether the ship was seaworthy when she sailed is for the jury (*p*):⁴ whether any thing has been done

Seaworthiness.

(*j*) *M'Dowall v. Fraser*, Dougl. 260. *N. R.* 15. *Bridges v. Hunter*, 1 Maule & Sel. 14. *Mackintosh v. Marshall*, 11 Mees. & Wels. 121. *Duer on Representations*, 78, 196.

(*k*) *Littledale v. Dixon*, 1 Bos. & Pull. *N. R.* 151. *Rawlins v. Desborough*, 2 Mood. & Rob. 328. *Westbury v. Aberdeen*, 2 Mees. & Wels. 287.

(*l*) *Mackintosh v. Marshall*, 11 Mees. & Wels. 126.

(*m*) *Willes v. Glover*, 1 Bos. & Pull.

(*n*) *Littledale v. Dixon*, 1 Bos. & Pull. *N. R.* 151. *Elton v. Larkins*, 5 O. & P. 86, 362.

(*o*) *Mount v. Larkins*, 8 Bingh. 108. See also *Phillips v. Irving*, 7 Man. & Gr. 325.

(*p*) See *ante*, Part II. Chap. IV. *Sect. III. pp. 685-688.

¹ *New York Firem. Ins. Co. v. Walden*, 12 John. 513; *Livingston v. Delafield*, 1 John. 522; *Murgatroyd v. Crawford*, 3 Dallas, 491; *Livingston v. Maryland Ins. Co.* 6 Cranch, 274; *Maryland Ins. Co. v. Rudens*, 6 Cranch, 338; *Fletcher v. Commonwealth Ins. Co.* 18 Pick. 419.

² *Lippincott v. Louisiana Ins. Co.* 2 Louisiana Rep. 390; *Crosby v. Fitch*, 12 Conn. 421.

³ The materiality of the time of sailing is for the jury; *McLanahan v. Universal Ins. Co.* 1 Peters, (S. C.) 188, 191; so is the question, whether a deviation has taken place by a vessel being detained in the offing of the harbor, waiting for the master and for the papers; *ib.*; so, what is a suitable crew, and what is pilot ground; *ib.*; *Treadwell v. Union Ins. Co.* 6 Cowen, 270. The fairness of a valuation is a question for the jury. *Clark v. Ocean Ins. Co.* 16 Pick. 260; so, whether a loss within the policy has taken place. *Mer. Ins. Co. of Alex. v. Tucker*, 3 Cranch, 357.

⁴ *Chase v. Eagle Ins. Co.* 5 Pick. 51; See *Prescott v. Union Ins. Co.* 1 Wheat. 399.

Provinces of the court and jury in trials on policies of insurance.

Illegality — notice of blockade.

Extent of interest intended to be insured.

1316 *

Constructive total loss by wreck or stranding.

Time for notice of abandonment.

Reasonable skill and care.

to waive the obligation of the implied warranty is for the court. (q).

In cases of alleged illegality for violating the laws of blockade, the question, whether *actual* notice of a blockade has been given to the captain is for the jury (r): whether he has had implied notice is for the court (s): the question, whether the captain was endeavoring to break the blockade, when taken, is a question for the jury. (t)

When the question turns upon the extent to which the plaintiff is entitled to recover, in respect of his interest, the jury may be asked whether, in procuring the policy to be effected, he intended to protect his own interest only, or that, also, of other parties not named on the record, but having an interest in the subject of insurance. (u)

In determining whether the loss on a wrecked or stranded ship is constructively total, the jury should be asked, whether a prudent owner, if uninsured, and acting on the soundest and best judgment that could be formed at the time and on the spot, would have sold or abandoned the ship, as she lay, rather than attempted to repair her: if so, the loss is total. (v) Whether notice of abandonment has been given in due time is a question for the court. (w)¹

In actions against policy brokers and other agents for negligence, the questions of *reasonable skill and care, due*

- (g) Weir v. Aberdeen, 2 B. & Ald. 320. 14. Irving v. Richardson, 2 B. & Ald. 123.
 (r) Harratt v. Wise, Duns. & Ll. 234. 123.
 Winder v. Wise, *ibid.* 238. * (v) *Supra*, Part III. Chap. VIII. Sect. II. Art. 2.
 (s) Naylor v. Taylor, *ibid.* 240. (w) Part III. Chap. IX. Sect. III. vol. ii. p. 1163.
 (t) *Ibid.*
 (u) Carruthers v. Shedden, 6 Taunt. ii. p. 1163.

¹ The question, whether an abandonment is made in a reasonable time, is a mixed question of law and fact, and where the facts are not agreed, it should be submitted to the jury. Reynolds v. Ocean Ins. Co. 22 Pick. 191; Smith v. Newburyport Ins. Co. 4 Mass. 668, 670; Maryland Ins. Co. v. Rudea, 6 Cranch, 336. See also the other cases cited to this point, *ante*, 1164, in note; Mellon v. Louis. State Ins. Co. 6 Martin, (N. S.) 424. Whether an abandonment has been accepted or not is a question for the jury; Bell v. Smith, 2 John. 98. So, whether due diligence has been exercised in countermanding an order for insurance. M'Lanahan v. Universal Ins. Co. 1 Peters, (S. C.) 194. So, what is such a necessity as will justify the master in selling the cargo, in a case of shipwreck. Per Putnam, J., in Bryant v. Commonwealth Ins. Co. 13 Pick. 543.

diligence, and gross negligence, must generally speaking, be decided by the jury. (x)

Provinces of the court and jury in trials on policies of insurance.

SECT. II. *Of the Admissibility of Parol Evidence to explain Policies.*

§ 462. The principles relating to this branch of the law of evidence, as far as it affects policies of insurance, have already been considered and illustrated in the chapter on the construction of the policy, to which, therefore, the reader is referred for further information on the point (y) : ¹ the general result of the authorities is, that in this, as in every other case of the interpretation of written instruments by parol testimony, such evidence is admissible only to explain, and never to vary, control, or contradict, the terms of the contract : ² nor *does the evidence of the customs and usages of particular trades, as applied to the interpretation of policies, form any virtual exception to this now well established rule ; ³ the decisions, as Lord Denman observes, going no further than this — that such evidence is admissible “for the necessary explanation of *ambiguous terms*.” (z) ⁴ It is on this principle,

Of the admissibility of parol evidence to explain policies.

Principal and extent to which parol evidence is admissible.

* 1317

Only to explain doubtful terms.

(x) Taylor on Evidence, vol. i. pp. 37, 38. As to the nature of the evidence on which their judgment, in such case, is to be founded, see *ante*, vol. i. p. 156-163.

him on this subject, to the very able and lucid statement of the law contained in Mr. Taylor's Law of Evidence, part ii. chap. xviii. vol. ii. pp. 742-795.

(z) In Trueman v. Loder, 11 Ad. & Ell. 600.

(y) Part I. Chap. III. pp. 64-80. The reader will thank me also for referring

¹ *Ante*, 75 to 80, in notes ; 1 Duer, Ins. 167, § 14, et seq.

² See 1 Greenl. Ev. § 275, et seq. ; 1 Duer, Ins. 176, § 27 ; Astor v. Union Ins. Co. 7 Cowen, 202 ; Murray v. Hatch, 16 Mass. 465 ; Mellen v. National Ins. Co. 1 Hall, 452 ; Levy v. Merrill, 4 Greenleaf, 160. Where a policy contained a memorandum written on the margin, that the ship was spoken “on the 27th of August,” it was held, in Massachusetts, that, in a suit at law, proof that “27th” was inserted by mistake, instead of “20th,” was not admissible. Ewer v. Wash. Ins. Co. 16 Pick. 192.

³ 1 Greenl. Ev. § 292, et seq. ; 2 Greenl. Ev. § 377 ; Eager v. Atlas Ins. Co. 14 Pick. 141.

⁴ “Parol evidence of usage or custom is admissible,” says Mr. Greenleaf, “‘to *annex incidents*,’ as it is termed, that is, to show what things are customarily treated as incidental and occasional to the principal thing, which is the subject of the contract, or to which the instrument relates. This evidence is admitted on the principle, that the parties did not intend to express in writing the whole of the contract, by which they were to be bound, but only to make their contract with reference to the known

Of the admissibility of parol evidence to explain policies.

Never to contradict or control the plain language of the policy.

and only to this extent, that the evidence of contemporaneous parol statements can be admitted to interpret the policy: they can only be used to explain its ambiguous terms, never to restrain or contradict its plain language.¹ Thus, where a policy plainly specified Archangel and Leghorn as the two termini of the voyage, the underwriters were not allowed to prove, by parol evidence, that the risk was not to commence till the ship had reached the Downs. (a) So, where a policy was effected on goods, "in ship or ships," from Surinam to London, parol evidence was held inadmissible to show that a particular ship, which was lost, had been verbally excepted at the time of the contract. (b)

SECT. III. Witnesses. — Effect of Lord Denman's Act.

Witnesses. — Effect of Lord Denman's act.

Since Lord Denman's act the party on whose behalf a policy is effected seems to be still inadmissible as a witness for the party in whose name the action is brought.

§ 463. Since Lord Denman's act (6 & 7 Vic. c. 85., A. D. 1843,) all objections to the competency of witnesses, on the ground of interest, have been removed, subject to certain exceptions, of which the only one that appears to have any practical bearing on actions upon policies, is that relating to "*any person in whose immediate and individual behalf any action may be brought or defended, either wholly, or in part.*"

Under this exception, it should seem that, where the action on the policy is brought in the name of the broker, the party on whose behalf it is effected would still be an in-

(a) *Kaimes v. Knightley*, Skin. 54. Comp. 2 C. & J. 244. *Crofts v. Mar-*

(b) *Weston v. Enes*, 1 Taunt. 115; *aball*, 7 C. & P. 597; and see vol. i. pp. and see *Blackett v. Royal Exch. Ass.* 75, 79.

and established usages and customs relating to the subject-matter. But, in all cases of this sort, the rule for admitting the evidence of usage or custom must be taken with this qualification, that the evidence be not repugnant to, or inconsistent with, the contract; for, otherwise, it would not go to interpret and explain, but to contradict that which is written. This rule does not add new terms to the contract, which cannot be done; but it shows the full extent and meaning of those which are contained in the instrument." 1 Greenl. Ev. § 294. See *ante*, 75 to 80, in notes and cases cited; 1 Duer, Ins. 176, § 27, et seq.

¹ "The principle of admission," says Mr. Greenleaf, "in all the cases in which parol evidence has been admitted in exposition of that which is written, is, that the court may be placed, in regard to the surrounding circumstances, as nearly as possible in the situation of the party, whose written language is to be interpreted, the question being, what did the person, thus circumstanced, mean by the language he has employed?" 1 Greenl. Ev. § 295, a. See *Coulson v. Bowne*, 1 Caines, 291.

admissible witness for the *plaintiff*; at least, in the absence *of distinct proof, that the action was not brought by his authority, or for his benefit. (c) It is suggested by Mr. Taylor that, in cases of this nature, the question on which the competency of a witness mainly turns, is, whether he has authorized expressly or impliedly the commencement or defence of the action, and whether, in point of fact, he has rendered himself, in any way, directly responsible for the costs. (d) ¹

Witnesses. —
Effect of Lord
Denman's act.

* 1318

SECT. IV. *Proof, Admissibility, and Effect of Documents frequently adduced in Trials on Policies.*

ART. 1. *Proof of Judgments of Foreign Prize and of Vice-Admiralty Courts.*

§ 464. The usual mode of authenticating the judgments of foreign courts is, by exemplification, under the seal of the court (e); and, as a general rule, *the seal must be proved* (f) ² The courts of the United States have, however, admitted an exception to this latter branch of the rule with regard to seals of foreign *prize* courts, on the ground that such seals belong to courts of the Law of Nations (g): it may be con-

Proof, admissibility, and effect of documents frequently adduced in trials on policies.

Proof of foreign judgments generally. Will our courts take judicial notice of the seal of foreign courts of prize?

(c) See Taylor on Evidence, § 976, vol. ii. p. 892, and the case of Bell v. Smith, 5 B. & Cr. 166 there cited.

(d) Taylor on Evidence, *quod supra*.

(e) Taylor on Evidence, vol. ii. pp. 1031, 1032. It may also be by examined copies. *Ibid*.

(f) Henry v. Adey, 3 East, 221. Bucha-

nan v. Rucker, 1 Camp. 63. 9 East, 192 S. C.

(g) 2 Kent's Comm. (5th ed.) 121.

note (a). Story's Conflict of Laws, 898.

Yeaton v. Fry, 5 Cranch, 335, 343.

Thompson v. Stewart, 3 Conn. 171.

1 Greenl. Ev. § 5. }

¹ See 1 Greenl. Ev. § 395; Steinbach v. Rhineland, 3 John. Cas. 269. The master of the vessel is, to most purposes, a competent witness in suits on policies upon the ship or cargo; as, to prove a loss of a part of the cargo by plunder by a privateer. Hicks v. Fitzsimmons, 1 Wash. C. C. 279. So other agents. Mackay v. Rhineland, 1 John. Cas. 408; Rankin v. Amer. Ins. Co. 1 Hall, 619. The shipowner may be a witness for the shipper of goods in an action upon a policy on goods. Ruan v. Gardner, 1 Wash. C. C. 145. But see Rotherve v. Elton, Peake, 84; Morish v. Foote, 8 Taunt. 457.

² See 1 Greenl. Ev. § 514: Catlett v. Pacific Ins. Co. 1 Paine C. C. 595; Buttrick v. Allen, 8 Mass. 273; Packard v. Hill, 7 Cowen, 434; Yeaton v. Fry, 5 Cranch, 335; Gardner v. Columbian Ins. Co. 7 John. 514; Talcott v. Delaware Ins. Co. 2 Wash. C. C. 449. But the seal of a court under the same jurisdiction needs not to be proved. Sobry v. Laistre, 2 Harr. & John. 193; 1 Greenl. Ev. § 6.

Proof, admissibility, and effect of documents frequently introduced in trials on policies.

Seals of all other foreign and colonial courts must be proved.

considered doubtful whether the same rule would be acted upon in this country. (*h*)

The seals of all other foreign courts, of our own colonial vice-admiralty courts, and even the great seals of the colonies, require to be proved. (*i*)

The admissibility and effect of foreign judgments have been already sufficiently considered elsewhere.¹

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*ART. 2. *Lloyd's Lists and Books, and Lloyd's Shipping Register.*

Lloyd's books and English lists admissible as proving notice to underwriter of fact alleged to have been concealed.

§ 465. We have elsewhere explained the nature of Lloyd's lists, both foreign and English, and the mode in which Lloyd's books are made up (*j*): whenever the question turns upon the concealment of a material fact, Lloyd's *English lists*, and Lloyd's *books*, are admissible, in evidence, as presumptive proof that the underwriter had knowledge of their contents, they being documents to which, in the ordinary course of his business, he has access (*k*): nor need it be shown, in order to fix him with knowledge of their contents, that his attention was peculiarly directed thereto; for it is his duty, and part of his occupation to consult them (*l*): if, indeed, information as to the ship's name, &c., necessary to enable the underwriter to apply the intelligence contained in Lloyd's lists to the particular subject of insurance, have not been communicated to him, the presumption of notice arising from this assumed knowledge of their contents falls to the

(*h*) Taylor on Evidence, vol. i. p. 15.

(*i*) See authorities referred to in Taylor on Evidence, vol. i. pp. 14, 15. < 1 Greenl. Ev. § 514. Catlett v. Pacific Ins. Co. 1 Paine C. C. 595. The certificate of a consul is not an admissible authentication of the sentence of a foreign Court. Vanderpool v. Smith, Pres. of Col. Ins. Co. 2 Caines Rep. 155. Catlett v. Pacific Ins. Co. 1 Paine C. C. 595. } The

Documentary Evidence Act (8 & 9 Vict. c. 113.) has made no alteration in this respect. See Taylor, *ibid*.

(*j*) Vol. i. p. 82, 83.

(*k*) Abel v. Potts, 3 Esp. 242. Lynch v. Durnsford, 14 East, 494. Elton v. Larkins, 5 C. & P. 38, 385. 8 Bingh. 198. Mackintosh v. Marshall, 11 Mees. & Wels. 116.

(*l*) 11 Mees. & Wels. 120.

¹ *Ants*, 638 to 651, and in notes; Zino v. Louisiana Ins. Co. 6 Martin N. S. 62; Baxter v. N. Eng. M. Ins. Co. 6 Mass. 277; Johnston v. Ludlow, 1 Caines Cas. xxix; Kemble v. Rhineland, 3 John. Cas. 127; De Wolf v. N. Y. Ins. Co. 20 John. 214; S. C. 2 Cowen, 56; Ocean Ins. Co. v. Francis, 2 Wendell, 65; Ludlow v. Dale, 1 John. Cas. 16; 3 Caines, Cas. 348; Goix v. Low, 1 John. Cas. 341; S. C. 2 John. Cas. 480.

ground (*m*); and the case is the same, if the assured have made any representation inconsistent with the lists which is calculated to mislead the underwriter. (*n*)

Proof, admissibility, and effect of documents frequently adduced in trials on policies.

Whether the contents of the *foreign lists* filed in Lloyd's inner room are to be presumed known to the underwriter is a point not yet decided: upon the evidence adduced before the Court of C. Pleas on the point in the only case where it was distinctly raised, their judgment was against the presumption as a general rule. (*o*)

Query, as to the *foreign lists*.

In one case Lord Kenyon admitted Lloyd's lists as evidence of the *fact of capture* (*p*); and in another case, on a question of concealment, Lord Tenterden admitted them as **against the assured*, to prove that the coast of Peru had been declared in a state of blockade by the Chilian government, coupled with the evidence of the broker, that he had read the notification in the list before effecting the policy. (*q*)

Lloyd's books admitted to prove fact of capture and blockade.

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Lloyd's Shipping Register is a document prepared under the authority of the chairman and committee of Lloyd's Register of British and Foreign Shipping, (constituted in its present form in A. D. 1834,) and is made up from the reports of shipping surveyors, stationed at London and the outports, and known as *Lloyd's Surveyors*: the professed object of the society, and of the register published under their sanction, is to obtain, and exhibit for the use and information of ship-owners and underwriters, a classification of different ships which shall indicate with as much correctness as possible, their real and intrinsic qualities: to this end, all ships surveyed by the society are classed in the register under certain letters, indicating various degrees of age, strength and staunchness. Ships of the first description of the *first class* are indicated by the letter A, or in advertisements commonly A. I. Ships of the second description of the *first class* are designated by the diphthong *Æ*; if of a superior character, they are distinguished in red by an asterisk thus affixed, **Æ*.

Lloyd's British and Foreign Shipping Register: mode in which it is prepared.

Ships of the *second class*, being fit to carry cargoes not in their nature liable to sea damage, are designated by the letter E.

Ships of the *third class*, being those deemed fit to be em-

(*m*) *Lynch v. Durnsford*, 14 East, 494.

(*o*) *Elton v. Larkins*, 8 Bingh. 193.

(*n*) *Mackintosh v. Marshall*, 11 Mees. & Wels. 116.

(*p*) *Abel v. Potts*, 3 Esp. 242.

(*q*) *Bain v. Case*, 3 C. & P. 496.

Proof, admissibility, and effect of documents frequently adduced in trials on policies.

Admissibility in evidence of Lloyd's Shipping Register.

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played on short voyages not out of Europe—by the letter I., &c. &c. (r)

With regard to the admissibility in evidence of Lloyd's Shipping Register, it should seem that it will never be received as proof of the truth of what it contains, even to the extent of showing that ships, in the general understanding of the trade, really have the character ascribed to them in the register: thus, in an action by the purchaser against the seller of the ship, for falsely representing that she was copper-fastened, the defendants proposed to adduce in evidence Lloyd's Register, wherein she was described as so being, in order to show that, at the time of sale, she was, among shipowners and underwriters, considered as copper-fastened: but Lord Denman rejected the evidence, remarking that the court did not know enough of the manner in which the book was made up to justify its admission (s); and experience shows that there are very good reasons for this exclusion.

SECT. V. *Proof of the making of the Policy. — Agency.*

Proof of the making of the policy. — Agency.

Agency in effecting the policy must be proved as laid: what is proof of an order to insure under 28 G. 3. c. 56. Ratification is equivalent to a prior order. Woolf v. Horncastle, 1 Bos. & Pull. 316.

§ 466. The allegation that the policy was effected by the nominal assured as agent for the party interested, under the provisions of the statute 28 G. 3. c. 56., must be substantially proved as laid.

In the leading case on this subject, the allegation that the policy was effected by the plaintiffs as agents for one Lund, and for his use and benefit, was held to be sustained by proof, that plaintiffs had effected the policy as general agents for Lund, and consignees of the bill of lading; and that Lund, after being informed of their having effected the policy on his behalf, had written to approve of their having done so. (t) The main principle acted upon in this case, and illustrated more or less by most of the subsequent decisions

(r) For further information as to the mode of preparing the register, see the case of *Kerr v. Shedden*, 4 C. & P. 528, which relates to the period before 1834: for the present state of the society, and the mode of classification adopted since 1834, see *M'Culloch's Comm. Dict. Sup-*

plement for 1836, p. 88, tit. "Ships, Classification of," who gives full particulars. See also *Mr. Wilkinson's Law of Shipping*, pp. 76–82.

(s) *Freeman v. Baker*, 5 C. & P. 475.

(t) *Woolf v. Horncastle*, 1 Bos. & Pull. 316.

on the point, is, that subsequent ratification of the insurance by the principal on whose behalf it is effected is equivalent to a prior order, on his part, to insure—*omnis ratihabitio retrotrahitur, et mandato equiparatur*.

Proof of the making of the policy.
Agency.

Prime agents.

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Thus, in the instance of insurances caused to be effected by the commissioners of Dutch prizes in the great case of *Lucena v. Crawford*, and in others caused to be effected by *prize agents for captors, it was held that, though the commissioners, in the one case, and the captors, in the others, had no insurable interest on their own account, yet a subsequent adoption by the crown of the insurances they had respectively procured to be effected, was equivalent to a prior order to insure on behalf of the crown, and consequently amounted to proof of an allegation, that the insurance was effected by the plaintiffs, as agents, on account of his Majesty.(u) But where, in a similar case, the allegation was, that the insurance was on *account of the captors*, this was held not to be proved by a subsequent ratification by the crown.(v) But no one can be said to adopt or ratify that of which, at the time of giving the supposed ratification, he was ignorant. Hence, where the agents, in this country, of a merchant residing in America, three days after they had effected insurance on his behalf, received from him a letter (written, of course, before he knew of what had been done) directing them, in general terms, to insure—this evidence was held not sufficient to support an allegation that the plaintiffs had received the order for, and effected the insurance for the benefit, and on account of, the foreign principal (w): if, however, the ratification be given after knowledge of the insurance, the length of time which may have elapsed, between the making of the policy and the giving of the ratification, will not prevent its being held equivalent to a prior order. Thus, where *Hagedorn*, resident in London, had procured a policy to be effected on ship, in the common form, (i. e. "as well in his own name, as for and in the names of all and every other person, &c.") for the benefit of *Schröder*, a foreign merchant resident abroad, who was interested in a moiety of the ship; and there was

Ratification implies previous knowledge of the thing ratified.
Bell v. Jansen, 1 M. & Sel. 201.

Length of time that has elapsed between the insurance and the ratification is unimportant.
Hagedorn v. Oliverson, 2 M. & Sel. 485.

(u) *Lucena v. Crawford*, 3 Bos. & Pull. N. R. 269. *S. C.* on venire de son, 13 East, 274.
novo, 1 Taunt. 325. *Stirling v. Thompson*, 11 East, 620, 623. *Routh v. Thompson*, 13 East, 274.

(v) *Routh v. Thompson*, 11 East, 428.
(w) *Bell v. Jansen*, 1 M. & Sel. 201.

Proof of the making of the policy.—
Agency.

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Letter directing insurance received by broker from his principal abroad, with ship-letter mark and date of year, is proof of an order to insure.

Effect of proving post-mark generally.

A slight variance between the style of broker's firm as alleged, and as proved, is unimportant. *Dickson v. Lodge*, 1 Stark. 226.

no evidence of any direction having been given by Schroeder to insure in the first instance: but it appeared that, two years afterwards, and after the loss of the ship, Schroeder *wrote to Hagedorn, that he hoped he had procured a final settlement from the underwriters under the policy—this was held sufficient proof that Hagedorn was the person who had given the order to effect the insurance within the true meaning of 28 G. 3. c. 56.; and, therefore, that the action was well brought in plaintiff's name, averring interest in Schroeder. (x)

Where, in a similar case, the action was brought by the foreign principal, on a policy effected in the name of an insurance broker, in the common form, Lord Ellenborough held that the production of a letter, directing the insurance, written to the broker by the plaintiff from abroad, with the English ship-letter postmark upon it, and the date of the year on which the policy was effected, was sufficient proof of an averment in the declaration, that such broker was "the person residing in Great Britain, who received the order for, and effected the policy." (y) As this kind of proof may frequently be adduced in such cases, it may be well as to state that postmarks on letters are, *prima facie*, evidence that the letters were posted at the time and place therein specified (z); and, also, that if a letter, *properly directed*, is sent by the post, it is presumed that it reached its destination at the regular time, and was received by the party to whom it was addressed. (a)

A slight variance between the style and firm of the policy brokers, as alleged in the declaration, and as made out in proof, was held not to be material, even before the late amendment act and the rules of pleading prohibiting more than one special count on policies of insurance. Thus, where the allegation was that the policy had been effected by "Gray, Wilson and Co." as the agents of the plaintiff; and the proof was, that it had in fact been effected, not by "Gray,

(x) *Hagedorn v. Oliverson*, 2 Maule & Sel. 455.

(y) *Arcangelo v. Thompson*, 2 Camp. 620.

(z) *Fletcher v. Braddy*, 3 Stark. Rep. 64. *R. v. Johnson*, 7 East, 65. *R. v. Plumer*, Russ. & Ry. 304.

(a) Taylor on Evidence, vol. i. p. 118, § 117, who cites the authorities: if the address be too general the presumption will not arise. *Walter v. Haynes*, Ry. & Mood. 109.

Wilson, *and Co.," who were a *London* house, but "Gray and Co.," a *Liverpool* house, consisting of the same members, omitting one: Lord Ellenborough held the variance immaterial, and said, that if the two houses had only one member in common it would be sufficient (*b*): this would be so *à fortiori*, since the alterations in the law above referred to: *after verdict*, it will be intended that sufficient proof has been given that the plaintiffs effected the policy as agents for the party really interested, or gave the order for insurance, or in some way or other brought themselves within some one of the descriptions of the 28 G. 3. c. 56. : Lord Ellenborough, therefore, refused to *arrest judgment* in an action on a policy, though it appeared, on the face of the declaration, that the plaintiffs on the record were neither the persons named in the policy, nor the parties interested. (*c*)

Proof of the making of the policy. — Agency.

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After verdict agency will be taken to be proved as alleged. *Mellish v. Bell*, 15 East, 40.

SECT. VI. *Proof of the Subscription of the Policy. — Authority of Agents.*

§ 467. Unless admitted, as is very generally the case, the subscription of the policy must be proved in the usual way: where the underwriter's signature has actually been written by himself, no difficulty can arise; where, however, as not unfrequently occurs, the policy has been subscribed by brokers, or other agents on his behalf, a question may arise as to the authority of the agent: as to this, proof that *the agent had often subscribed policies in defendant's name*, and that the defendant had held him out to the world as properly authorized for that purpose, was held, by Lord Kenyon, sufficient evidence of an authority to sign, *without proof of any written authority* so to do (*d*): Lord Ellenborough, in one case, seems to have thought this proof not sufficient (*e*); but admitted it to be so in another, when coupled with the additional fact, that the *defendant had been in the habit of paying *losses* on policies so subscribed. (*f*) Proof that the agent of an insurance company was in the habit of signing other memoranda of a similar nature, was held sufficient proof of

Proof of the subscription of the policy. — Authority of agents.

Proof of authority to sign policies.

* 1325

(b) *Dickson v. Lodge*, 1 Stark. 226.

(c) *Mellish v. Bell*, 15 East, 40.

(d) *Neal v. Irving*, 1 Esp. 61.

(e) *Courteen v. Towne*, 1 Camp. 43.

(f) *Houghton v. Ewbank*, 4 Camp. 48.

Proof of the subscription of the policy. — Authority of agents.

Authority to subscribe implies authority to sign adjustment.

his authority to sign a memorandum for a change of voyage indorsed on the policy. (*g*)

It is, it seems, to be presumed, that an agent who has authority to subscribe a policy, has also authority to sign the adjustment of a loss. (*h*)

Proof of subscription by an authorized agent, will satisfy an allegation of signature by the defendant. (*i*)¹

SECT. VII. *Proof of Compliance with Warranties.*

Proof of compliance with warranties.

Express warranties being conditions precedent, compliance therewith must be proved.

Proof of warranty of national character.

§ 468. All express warranties being conditions precedent to the policy's attaching, the compliance with them is part of the plaintiff's title, must accordingly be proved by him in the first instance; but *prima facie* proof of compliance will, it seems, be sufficient, until it is rebutted by counter proof on the side of the defendant.

Thus, under a warranty that the ship insured was *Danish*, it being proved by the assured that the captain addressed himself to the Danish consul at the port of departure, that he carried Danish colors when he left it, and that he still had the same colors, surmounted by those of the captors, when brought by them into an intermediate port — Lord Ellenborough said, that this was sufficient *prima facie* evidence of national character, so as to entitle the jury, in the absence of proof to the contrary, to find that the ship really was Danish according to the warranty. (*j*)² The official letter *of the commander of the convoy, and the log book of the convoying man-of-war, were held admissible by Chief Baron Eyre (*k*) and by Lord Ellenborough (*l*), to prove compliance with a warranty to sail with convoy.

Whether it is for the assured to prove the ship to have

(*g*) *Brockelbank v. Sugrue*, 3 C. & P. 21. See further as to the due execution of an authority to sign policies, *Guthrie v. Armstrong*, 1 Dowl. & Ry. 248. *Mead v. Davidson*, 3 Ad. & Ell.; and see *ante*, vol. i. pp. 144, 145.

(*h*) *Richardson v. Anderson*, 1 Camp. 43, note.

(*i*) *Nicholson v. Croft*, 2 Barr. 1108.

(*j*) *Arcangelo v. Thompson*, 2 Camp. 620.

(*k*) *D'Israeli v. Jowett*, 1 Esp. 427.

(*l*) *Watson v. King*, 4 Campb. 375.

* 1326

To sail with convoy.

been *seaworthy* at the commencement of the risk, or whether it lies on the defendant to give proof that she was then unseaworthy, is a question that will be considered hereafter. (m)

Proof of compliance with warranties.

SECT. VIII. *Proof of Interest.*

ART. 1. *In different Subjects of Insurance — Means of Proof.*

§ 469. Upon a policy *on ship*, the possession of the assured as owner is *primâ facie* evidence of property, until further evidence be rendered necessary, in support of the title thus made, in consequence of its being impeached by contrary proof on the other side: it is not necessary for the assured, in the first instance, to prove that the ship is registered in his name: thus, where it was proved by the captain that the assured were the persons, by whom, *as owners, he was appointed and employed* — this was held to be sufficient *primâ facie* evidence of ownership; and, though it afterwards appeared, by his answers, on cross examination, that the ownership was derived to the assured under a bill of sale executed by himself as attorney to the former owner, it was further held that it did not, on this account, become necessary to produce the bill of sale or the ship's register, or to give any further proof of property beyond the mere fact of ownership, no contrary proof having been adduced on the other side (n): to the same effect Lord Kenyon had previously ruled that evidence of the assured having exercised acts of ownership in *directing the loading, &c. of the ship and paying the people employed*, was sufficient proof of interest (o); and Lord Ellenborough had held evidence that the party in whom interest was averred, had ordered and paid for stores, &c., to be sufficient *primâ facie* proof of his ownership, though it came out, on cross examination, that he had derived his title under a bill of sale, which was not produced. (p)

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Proof of interest in ship: evidence of acts of ownership *primâ facie* sufficient, even where it appears that there has been a transfer of title.

Appointment and employment of captain. *Robertson v. French*, 4 East, 130.

Directing loading of ship and paying crew. *Amery v. Rogers*, 1 Esp. 208.

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Ordering stores. *Thomas v. Foyle*, 5 Esp. 88.

The nature of the *contrary proof on the other side*, which rebuts this *primâ facie* evidence of ownership appears by the

The registry or certificate need never be produced in the first instance to prove plaintiff's insurable interest in ship.

(m) See *post*, Sect. IX. p 1345.

(o) *Amery v. Rogers*, 1 Esp. 208.

(n) *Robertson v. French*, 4 East, 130.

(p) *Thomas v. Foyle*, 5 Esp. 88.

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But if produced, and plaintiff's name omitted, it is conclusive to disprove such interest.
 Marsh v. Robinson, 4 Esp. 98.
 Camden v. Anderson, 5 T. Rep. 709.

Its production, however, with plaintiff's name inserted, is not even *prima*

two following cases: a ship having been insured in the name of "Elizabeth Marsh & Son;" the son brought the action, and averred the interest in himself alone; in order to prove his interest as alleged, he called the captain, who proved having been employed by him to take the command, pay the seamen and draw bills on account of the ship: this was held sufficient *prima facie* evidence of interest: the defendant then showed that *at the time the policy was effected, other parties' names were on the register*, and that there was no change in the registry till after the date of the insurance: Mr. J. Le Blanc held this to be conclusive against the plaintiff's title. (q) So where *three* plaintiffs, in order to make out an insurable interest in freight, proved that the ship, out of the ownership of which the claim to freight arose, had been paid for by themselves and a fourth person who was in partnership with them, the court held this *prima facie* proof of ownership to be conclusively rebutted by the production of the register, wherein the ship was registered in the names of *two* of them only (r): "the production of the register," says Mr. J. Le Blanc, "showing the title to be in two of them only, threw upon them the burden of proving a subsequent title in all the three." (s) ¹

But though the production of the register or certificate in which his name is omitted is thus conclusive to negative the interest of the assured, yet its production with the name

(q) Marsh v. Robinson, 4 Esp. 98.

(s) In Tinkler v. Walpole, 14 East,

(r) Camden v. Anderson, 5 T. Rep. 229.
 709.

¹ In Bixby v. Franklin Ins. Co. 8 Pick. 86, the Supreme Court of Massachusetts held a bill of sale not necessary to transfer property in a ship. Parker, Ch. J., said, in this case; — "We do not find, that a bill of sale, or other instrument in writing or under seal is essential to the transfer of a ship, more than of any other chattel. Such a document may be required in the admiralty courts; but we are not aware that the principle has been introduced into the common law. We think a bargain, a consideration paid, and a delivery, will pass the property from one to another, in a ship or other vessel. Inconveniences may arise in foreign countries, and in the custom-house, from the want of a bill of sale; but the transfer is good between the parties." See, to the same effect, Lamb v. Durant, 12 Mass. 54; Taggard v. Loring, 16 Mass. 336; Balkham v. Lowe, 20 Maine, 369; Vinal v. Burrill, 16 Pick. 401; Abbott, Shipp. (6th Am. ed.) 2, in note; Lazarus v. Commonwealth Ins. Co. 5 Pick. 76; Ring v. M'Namara, 2 Hall, 1, 16, 17. But, in Obl v. Eagle Ins. Co. 4 Mason, 172, Mr. Justice Story held, that the title to a ship cannot pass by parol, when she is sold to a purchaser. See, also, 3 Kent, (5th ed.) 130, 131; Abbott, Shipp. (6th Am. ed.) 2, in note.

inserted is not, in itself, and without *more*, even *prima facie*, *evidence of his title: thus, where in an action brought by broker on a ship policy, the interest was averred to be in *three* persons as his principals: and to make out this averment the original register was produced, purporting to be made on the oaths of those persons, who had sworn, in pursuance of the act, that they were the sole owners; but this affidavit itself was not produced, and no evidence was given of any acts of ownership: the court held the proof insufficient, even as *primâ facie* evidence of interest, Mr. J. Gibbs remarking that it did not follow because the legislature made registration necessary to complete a title, that it thereby made it alone to be proof of title. (t)¹ So, where it appeared that all the affidavits on which registers had been granted, had been destroyed by fire, an entry in the register book stating that a certificate of register had been granted on plaintiff's affidavit, was held by Lord Ellenborough to be inadmissible as secondary evidence, to supply the want of such affidavit, without the further evidence of some person who had seen it, and knew that it had been made by him. (u) An agent, after accounting with his principals, and receiving money in that capacity, cannot dispute their title, and say that he did

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facie evidence of insurable interest, without proof of acts of ownership.

Pirie v. Anderson,
4 Taunt. 652.

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Entry in register book stating that certificate had been granted on plaintiff's affidavit, is not good secondary evidence of insurable interest.

Broker who has effected insurance and accounted for premiums with his principals, cannot set up the register against their claim for a loss paid to him as their agent.
Dixon v. Hammond,
2 B. & Ald. 310.

(t) Pirie v. Anderson, 4 Taunt. 652. Ellenborough in Flower v. Young, 3 Camp. 241; and see the remarks of Mr. Taylor, Law of Evidence, § 1275, vol. ii. p. 1159.
(u) Teed v. Martin, 4 Camp. 90.
Sir J. Mansfield, 4 Taunt. 656. Per Lord

¹ Mr. Greenleaf, in his work on Evidence, remarks, that "the register is not of itself evidence of property, except so far as it is confirmed by some auxiliary circumstance, showing that it was made by the authority or assent of the person named in it, and who is sought to be charged as owner. Without such connecting proof, the register has been held not to be even *primâ facie* evidence, to charge a person as owner; and, even with such proof, it is not conclusive evidence of ownership; for an equitable title in one person may well consist with the documentary title at the custom-house in another. Where the question of ownership is merely incidental, the register alone has been deemed sufficient *primâ facie* evidence. But, in favor of the person claiming as owner, it is no evidence at all, being nothing more than his own declaration." 1 Greenl. Ev. § 494; 3 Kent, (5th ed.) 149, 150; Bas v. Steele, 3 Wash. C. C. 381; Jones v. Pitcher, 3 Stewart & Port. 135; Ligon v. Orleans Nav. Co. 7 Martin, (Lou.) N. S. 682; Hacker v. Young, 6 N. Hamp. 95; Starr v. Knox, 2 Conn. 215; Bixby v. Franklin Ins. Co. 8 Pick. 86; Hatch v. Smith, 5 Mass. 42; Ring v. Franklin Ins. Co. 2 Hall, 1; Colson v. Boussey, 6 Greenl. 474; Brooks v. Bondsey, 17 Pick. 441; Vinal v. Burrill, 16 Pick. 401; Lord v. Ferguson, 9 N. Hamp. 390; Collyer, Parta. (Perkins's ed.) § 1235; Sharp v. United Ins. Co. 14 John. 201.

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not receive the money for *them*, but for some other person. Hence, where a broker, after having become sole registered owner of a ship, which had been previously owned by one of two partners, effected an insurance on the partnership account, and accounted with the partnership for the premiums, it was held that he could not set up his title on the register as a defence to an action for money had and received brought by the partnership, to recover the amount of a loss which had been paid by the underwriter to him, as the agent of both partners. (v)

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Proof of insurable interest in freight.

*Interest in *freight* is proved by proving an interest in the ship, as owner, charterer, or otherwise, and by showing that a charter-party was made, goods shipped, or that there was some contract entered into, or act done, whereby an insurable interest in freight accrued. (w)¹

Proof of insurable interest in goods.

Interest in *goods* is proved either as in the case of ship by evidence of possession or of acts of ownership; or by transfer of title to the assured by bill of lading, or other document; or by evidence of the payment of the price.²

Bill of lading.

The *bill of lading* is the usual evidence of the ownership of property shipped; the consignee or his assignee being presumed to be the owner where it is not otherwise expressed in the bill of lading (x): this document being merely an acknowledgment by the master, is no evidence in an action on the policy without authentication (y); and, even if authenticated by the master, it seems that it will not amount to sufficient proof of insurable interest in the goods, without some further proof; as that the goods specified in it were actually shipped on board (z);³ at all events, it is clear that where the master guards his acknowledgment, as by writing on the bill "*contents unknown*," so that he does not charge

Where limited by the words "*contents unknown*." Haddow v. Parry, 3 Taunt. 303.

(v) Dixon v. Hammond, 2 B. & Ald. 310.

(w) Camden v. Andersen, 5 T. Rep. 709. Etches v. Aldan, 1 M. & Ry. 157; and see ante, Insurable Interest in Freight, vol. i. pp. 235 - 238.

(x) Hibbert v. Carter, 1 T. Rep. 476. Caldwell v. Ball, 1 T. Rep. 205.

(y) Dickson v. Lodge, 1 Stark. 226. (z) M'Andrew v. Bell, 1 Esp. 373.

¹ See Robbins v. New York Ins. Co. 1 Hall, 325.

² 2 Greenl. Ev. § 380.

³ The taking of a bill of lading by the assured, as being himself the shipper or assignee, is an act of ownership. Peyton v. Hallett, 1 Caines, 363.

himself with the receipt of any goods in particular, such bill of lading is not evidence, either of the quantity of the goods, or of the insurable interest of the consignee: nor can such document be proved as an admission, by proving the handwriting of the deceased master (a): whether the bill of lading, even as *between the consignee and shipowner*, can ever be *conclusive* evidence of the shipment of the goods, seems very doubtful: it has been decided that it is not so, where the action is by the consignee (but not the indorsee) against the ship-owner for non-delivery; and the bill of lading, when *produced, shows the shipment to have been made by a third party who was the plaintiff's agent. (b)¹

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Query, whether it is ever *per se* conclusive evidence of the shipment of the goods.

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Payment of price of goods.

Payment of price of the goods is satisfactory evidence of insurable interest: hence, a bill of parcels, with the vendor's receipt, for goods sold abroad, was, very early, held to be sufficient proof of interest (c); so the fact that consignees have given their acceptance to the consignors for the price, and on account, of the goods, if coupled with proof of payment, would, as it seems, be satisfactory evidence. (d)

To prove that the goods insured were shipped, a clerk in the custom-house produced the copy of an official paper, containing an account of the cargo as examined by the searcher; the official paper goes with the ship, and the copy is kept at the custom-house: Mr. J. Chambre ruled this copy to be admissible without calling the searcher, as being a paper made by the appointed officer under the authority of an act of parliament, and lodged as an official document in the custom-house. (e)

A copy, kept at the custom house, of the searcher's report of the cargo, is admissible in evidence to prove insurable interest in the goods.

In an action upon a policy on *bottomry* and *respondentia*

Proof of insurable interest in bottomry.

(a) *Haddow v. Parry*, 3 Taunt. 303. 29. 2 Nev. & Ferr. 178. A very instructive case as to the general effect in evidence of the bill of lading.
 In this case Mr. J. Lawrence seemed to think that the bill of lading, without the limiting words, *would* have been sufficient proof of an insurable interest in the goods, i. e. that they had been shipped on board.
 (c) *Russell v. Boehm*, 2 Str. 1127.
 (d) See *Davies v. Reynolds*, 1 Stark. 115.
 (e) *Johnson v. Ward*, 6 Esp. 47.

(b) *Berkley v. Watling*, 7 Ad. & Ell.

¹ The bill of lading of the outward cargo was considered by Mr. Justice Washington not to be evidence of the interest in the homeward cargo. The proceeds should be shown to have been shipped for the homeward voyage. *Beale v. Pettit*, 1 Wash. C. C. 241.

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loans, evidence of the execution of the bond, and of the interest of the borrower in the ship or goods, is sufficient proof of the interest of the assured, and the borrower himself was, even before Lord Denman's act, and *a fortiori* would be so since, a competent witness to prove his own interest in the ship or goods, by hypothecating which he raised the loan. (f)

Respondentia bond no proof of interest in goods, except by usage.

But in a policy on *goods* a respondentia bond is no proof of interest in the goods on which the money was borrowed (g); though, by the usage of the East India trade, proof of money laid out by the captain in the course of the voyage, and for which he charged respondentia interest, was held to be proof of insurable interest in a policy "*on goods, specie, and effects.*" (h)¹

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*ART. 2. *Amount of Interest.*

Under an averment of interest in the whole, plaintiff may prove an interest in part.

§ 470. Under a general averment of interest in the entire thing insured, the plaintiff may prove an interest in part, and recover *pro tanto*:² thus, where one of four part owners of a ship having insured her freight generally in an open policy, and averred his interest generally, without specifying it to be in only an aliquot part of the freight, it was held that he might recover in proportion to the amount of interest he proved. (i) So, *a fortiori*, if the plaintiff prove a greater interest than he has alleged in his declaration, this shall not preclude him from recovering to the extent of the interest *he alleged*. (j)

A fortiori proof of a greater interest will support averment of a smaller.

Where a plaintiff, only interested in one fourth of a ship, declared for a *total* loss of the *entire* ship, and proved only a *partial* loss, he was held entitled to recover in proportion to the partial loss on his fourth. (k)

(f) *Glover v. Black*, 1 W. Bl. 306.

(j) *Page v. Rogers*, Marsh. on Ins.

(g) *Glover v. Black*, 3 Burr. 1394. 1 736.

W. Bl. 405, 422.

(k) *Gardiner v. Crossdale*, 2 Burr. 904,

(h) *Gregory v. Christie*, 3 Dougl. 419. 1 W. Bl. 198.

(i) *Rising v. Burnett*, Marsh. on Ins. 736.

¹ Under a general averment of interest, the assured may prove any species of interest, either in the whole or in any particular part, and recover accordingly. 2 Greenl. Ev. § 379. It is not material whether the interest of the assured be legal or equitable. *Ib.*; and the American cases cited in note.

² See 2 Greenl. Ev. § 379.

In *open* policies the plaintiff must prove the actual value of the thing insured at the commencement of the risk : in policies on ship, this must be done *generally by the evidence of surveyors who can speak to the ship's condition at or about, the commencement of the risk ; in policies on goods, generally speaking, by the production of the invoice, bill of lading, &c.*

In *valued policies*, supposing the whole of the subject to which the valuation was intended to apply, to have been once at risk under the policy, the value in the policy, as we have elsewhere seen, is conclusive as between the assured and the underwriters, whether in cases of total or of average loss : in cases of average loss it constitutes the amount upon which the percentage of damage or depreciation is calculated, in order to ascertain the indemnity to which the assured is entitled : in cases of total loss it is itself the exact measure *of that indemnity ; and however much it may exceed the actual value of the subject insured, can never, unless grossly excessive, be set aside, on that ground alone.¹ On this point the doctrine has been well stated by Mr. J. Story. "The effect of a valuation, in point of law, is, that in all cases of total loss, where there is a substantial interest, and *bona fides*, it will be conclusive in regard to the value. It is true that a trivial interest will not save the policy ; neither will a substantial interest, if there is an intent to deceive or mislead the underwriter ; and a gross over valuation affords a presumption of fraud.² But if the policy is procured in entire good faith, if there is no intent to deceive, and if there is a substantial interest, then the over valuation, whatever it may be, is unimportant."³ (1)³

In such cases, therefore, the plaintiff need never give any proof of the *amount of his interest* ; but merely the fact that he had *some interest* of a substantial nature, in a subject cor-

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In *open* policies plaintiff must prove the insurable value of his interest at the commencement of the risk.

In valued policies the agreed value is taken as the insurable value of the interest : and the actual value need never be proved.

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Doctrine of the effect of valuation in the policy as an admission of the insurable amount of the interest.

Nature of proof where, in valued policies, only part of that to which the valuation was intended to apply has been risked and lost.

(1) † *Alsop v. Comm. Ins. Comp.* 1 *Irving v. Manning* before the House of Sumner, 451, cited 2 *Phillips Ins.* 743. Lords, cited *ante*, pp. 1110, 1111. See in English law the conclusive case of

¹ *Ante*, 303 to 309, and in notes, where the American cases to this point will be found cited.

² See *Ocean Ins. Co. v. Fields*, 2 Story, C. C. 59, 77.

³ This was said in a case of insurance on profits.

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responding to and satisfying the description in the policy. (m) Where in valued policies on goods or freight, the whole of the goods to which the valuation was intended to apply have never been at risk under the policy and at the time of loss proof must be given of the proportion, which the goods actually on board at the time of loss, bore to the whole quantity of the intended cargo; and this proportion must be applied to the agreed value in the policy, in order to ascertain the amount of indemnity. (n) ¹

ART. 3. Parties in whom Interest is vested, and time at which it accrues.

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§ 471. With regard to the proof of interest in the parties in whom it is averred in the declaration, the point has already *been so fully considered, that very little need be added in this place.

Where interest is not averred in the alternative it must still be proved as laid.

Where the alternative mode of averment given by the New Rules is adopted, proof of interest in any of the parties named in the declaration will be sufficient: where otherwise, the proof must still correspond strictly with the averment, on the principle as stated by Lord Ellenborough, that a disclosure of the real interest intended to be covered by the policy ought to be made, not only in order to apprise the underwriter, whose case he is to meet, but as a matter of public policy and convenience. (o)

Proof of interest averred in a firm.
Wright v. Welbie, 1 Chitt. 49.

In addition to the cases before cited, as to the necessity of proving interest as laid, the following may be inserted as showing the nature of the proof required: the plaintiff averred his interest to be in A. and B., and in "certain persons trading under the firm of W. and J. Bell and Co.:" on motion for a rule to show cause why judgment should not be arrested, because it was not proved who were the members of that firm, the rule was refused; the court holding it sufficient to

(m) *Lewis v. Rucker*, 2 Burr. 1171. see that case and *Cohen v. Hannam*, 5 Taunt. 101. *Carruthers v. Shedden*, 6

(n) *Forbes v. Aspinall*, 13 East, 323. Taunt. 14. *Powles v. Innes*, 11 Mees. Rickman v. Carstairs, 5 B. & Ald. 651. & Wels. 10.

(o) *Bell v. Analey*, 16 East, 141; and

prove that there was such a firm, and that they were interested in the goods, without proving the names of all the members. (p)

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§ 472. With regard to the time at which the interest of party must be shown to have accrued, we have seen that it is sufficient to prove that he was interested at any time during the risk, and at the time of loss (q);¹ and even, in cases of average loss, under a policy containing the clause "lost or not lost," it will be sufficient to aver and prove that he was interested at any time in the course of the voyage (r): the policy does not pass by an assignment of the ship or goods, "and if such assignment take place *before the loss*, an action cannot be brought on the policy on behalf of the assignor, averring interest in him, unless there have been an agreement between the parties, that he shall keep the policy alive for the benefit of the assignee (s): assignment, however, of his interest *after the loss*, will not prevent him from suing on the policy in his own name, or by an agent, averring the interest in himself. (t)²

Proof that interest has accrued during risk and at time of loss sufficient.

Or in policies "lost or not lost" at any time during the voyage.

Assignment of interest in thing insured before loss does not sustain allegation of insurable interest during risk and until loss.

Assignment after loss immaterial.

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(p) *Wright v. Welbie*, 1 Chit. Rep. 49.

(s) *Powles v. Innes*, 11 Mees. & Wels.

(q) *Rhind v. Wilkinson*, 2 Taunt. 237.

10.

Powles v. Innes, 11 Mees. & Wels. 10.

(t) *Sparkes v. Marshall*, 2 Bingh. N.

(r) *Sutherland v. Pratt*, 11 Mees. & Wels. 296.

C. 761.

¹ *Ante*, 231, 232, in note.

² See *ante*, 232, and in note. Policies of insurance in England and in the United States, in their ordinary form, are strictly personal contracts, and not incidents to the subject insured. They create an obligation on the part of the insurers to indemnify the parties really insured, against every loss such assured parties may sustain from the perils insured against, according to the terms of the insurance. In *Carroll v. Boston Marine Ins. Co.* 8 Mass. 517, Mr. Justice Parker, delivering the opinion of the court, said; — "It has been repeatedly decided here, that, under the forms of our policies, none but the parties to the contract, or their legal representatives, in case of their death, can avail themselves of the contract; although others may, in fact, have an equitable or even legal interest in the property insured. The only exception to this rule, which has been admitted, exists where a policy has been *bond fide*, and for a valuable consideration, assigned, with notice to the underwriter, and an assent on his part, either express or implied." And, in *Gordon v. Mass. F. & M. Ins. Co.* 2 Pick. 258, the same learned judge, then being chief justice, said; — "A man who has sold property insured, and received its equivalent in the price, cannot be said to suffer when the property is destroyed, nor can the purchaser avail himself of the insurance, because no contract was made with him, unless the insurer assents to the transfer, and agrees to continue his liability." See also *Lazarus v. Commonwealth Ins. Co.* 5 Pick. 78, 81; *Locke v. North Amer. Ins. Co.* 13 Mass. 61; *Ælma Ins. Co. v. Tyler*,

SECT. IX. *Proof of Ship's sailing, and that Risk had commenced before Loss.*

Proof of ship's sailing, and that risk had commenced before loss.

Allegation as to commencement of risk must be substantially proved as laid.

Allegation that loss occurred after goods were loaded and ship had sailed, not proved by showing that it had taken place while ship was at the port, and only part of cargo was put on board.
Abitbol v. Bristow,
6 Taunt. 464.

§ 473. As we have elsewhere seen, before a loss can be recovered from the underwriter, it must be shown to have taken place within the period, or local limits of the risk, or voyage insured: hence the averments that the ship was at the port, had sailed on the voyage, or that the goods were loaded on board, before the loss, must be substantially proved as laid: this may be done by the testimony of the master, or other officer acquainted with the circumstances, or by means of written directions transmitted to the master, or by licenses, charter-parties, entrances, clearances, convoy bonds, &c., preparatory to the departure of the ship, and indicating her destination. (u)

With regard to the *ship*, the following points have been decided: under a policy "*at and from*," the declaration averred that the loss happened *after the goods were loaded on*

(u) Stark on Evidence, vol. iii. p. 873, 3d ed.

16 Wendell, 365. A sale of the property insured, does not, however, operate to defeat the policy, unless it is absolute in its nature. See *Gordon v. Mass. F. & M. Ins. Co.* 2 Pick. 249; *Locke v. N. A. Ins. Co.* 13 Mass. 61; *Lazarus v. Commonwealth Ins. Co.* 5 Pick. 76, 81; *Higginson v. Dall*, 13 Mass. 96. Where the property is merely pledged or transferred as collateral security for a debt, the continuance of the personal liability of the assured is alone sufficient to preserve his insurable interest; and, consequently to sustain the validity of the contract. 1b. Policies of insurance are, however, assignable in equity, so that, although the assignee of such a contract may not be able to sue thereon in his own name, he still derives therefrom an available beneficial interest, unless there is some restriction or limitation imposed upon an assignment, by the policy. If there be no such restriction or limitation, the assent of the underwriter to the assignment is not essential. *Wakefield v. Martin*, 3 Mass. 558; *Earl v. Shaw*, 1 John. Cases, 313; *Wells v. Archer*, 10 Serg. & R. 432; *Spring v. S. Car. Ins. Co.* 8 Wheaton, 268; *Gourdon v. Ins. Co. of N. Amer.* 3 Yeates, 327. This equitable interest of the assignee is not one which he can enforce in a court of equity merely because of the assignment. 1 *Daniell's Ch. Pr.* (Perkins's ed.) 245, 249, in notes; *Carter v. United Ins. Co.* 1 John. Ch. 463. Courts of law recognise and entirely protect the interest and rights of the assignee. He had an unquestionable right to commence and prosecute a suit on the policy in the name of an assignor. After due notice of the assignment has been given to the underwriter, the assignor cannot defeat or prejudice the rights of the assignee. *Hackett v. Martin*, 8 Greenl. 77; *Hatch v. Dennis*, 1 Fairf. 244, 247; *Matthews v. Houghton*, ib. 429; *Frear v. Everton*, 20 John. 142; *Welch v. Mandeville*, 1 Wheaton, 233; *S. C.* 5 Ib. 277; *Jones v. Witter*, 13 Mass. 304; *Lyon v. Summers*, 7 Conn. 399.

board, and the ship had sailed on her intended voyage: the proof was, that it had taken place while the ship was "at" the port of outfit, and when only half the cargo was loaded on board: this was held a fatal variance, on the ground that the case presented a very different aspect to the underwriters, supposing the ship to have been lost in the course of the voyage, *from that which it would have assumed, had it been stated to have taken place in port. (v)

Proof of the ship's sailing, and that loss was during the risk.

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It must be proved that the ship had sailed *on the very voyage insured*: or if the loss should take place "at" the port where the risk is made to commence, then it must be shown that the ship was *at* such port *on the voyage insured* (w): where the ship has foundered at sea, this proof of her having sailed on the voyage insured frequently presents some difficulty. The following points have been decided as to the sufficiency of the evidence: to prove that a ship insured at and from Portsmouth to Quebec, had sailed for the latter place, a witness was called who stated that he had seen the ship in Stokes Bay, going out with the other ships from Spithead, and that she had never since been heard of: Lord Ellenborough held this insufficient: the convoy bond, from the custom-house, was then produced, with these words at the bottom of it—"convoy bond for Quebec;" and an officer from the customs said, that it was in the course of office to write these words on the bond, and that, though he did not know of any act of office being done on it, yet he had no doubt that the papers, for a voyage to Quebec, were delivered to the captain before sailing: Lord Ellenborough held this good *prima facie* evidence that the ship had sailed on the voyage insured. (x) In the same case, Lord Ellenborough said, that if it could be shown that the ship had a particular destination by *charter-party*, he should presume that she sailed on the chartered voyage; so, on proof that she had *cleared out* for a particular port, the presumption would be, that she had sailed for it when she dropped from her moorings. (y) A *license* to carry a cargo to a place named in the policy as to the port of destination, is *prima facie* evidence that the ship, when she left her port of outfit,

It must be proved that ship had sailed on the *very* voyage insured. How this is proved where ship has foundered at sea. *Cohen v. Hinckley*, 2 Camp. 50.

Production of *convoy-bond*.

Of *charter-party*, or *clearances*.

Of *license*.

(v) *Abitol v. Bristow*, 6 Taunt. 464. 2 Marsh. Rep. 157.

(w) *Cohen v. Hinckley*, 2 Camp. 50.

(x) *Ibid.* 51.

(y) 2 Camp. 52.

Proof of the ship's sailing, and that loss was during the risk.

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Of letter from correspondents abroad.

What is insufficient evidence for this purpose.

Koster v. Innes, Ry. & Mood. 333.

sailed on the voyage insured (z) : so is a *letter* received by the owners, in this country, from their **correspondents at the foreign port of destination*, stating that the ship had not then arrived there, but was expected in a few days. (a) In order to prove, under a policy on goods, that the ship had sailed on a voyage from Leghorn to Lisbon, the plaintiff called a packer, resident in Leghorn, who stated that he had packed the goods at the warehouse of the shipper, and, by his orders, delivered them to a boatman, to go by the ship ; the boatman was also called, who stated that he, by the shippers orders, had delivered them on board the ship, and taken a receipt for them from the captain, whom he knew ; and that he had heard, both from the shipper and the captain, that the vessel was bound for Lisbon. Chief J. Abbot held that this was not even *primâ facie* evidence that the ship *ever sailed for Lisbon*. (b)

Time of sailing need not be proved as laid. Proved by shipping entry at custom-house.

Where the averment was that the ship sailed after the making of the policy, and the proof was that she sailed before, the variance was held to be immaterial (c) : a shipping entry at the custom-house has been admitted to show the *time of the ship's sailing*. (d)

Proof of inception of risk on goods.

In case of *goods*, the inception of the risk is the *loading of them on board* ; and this must be proved either by direct testimony of the fact, or by the bill of lading, duly authenticated, and connected with the particular subject of insurance in the way already specified. (e) In case of goods, also, proof must be given that the loss took place within the period of the risk, or the limits of the voyage, insured : thus, where, in an action on a policy on goods, it appeared that the ship, after being turned away from her port of destination, sailed on another voyage not protected by the policy, and no proof was given whether the damage sustained by the goods had accrued on the first or the second of these two voyages, Lord Ellenborough directed a nonsuit, on the ground that **there was no distinct evidence that the goods were injured while protected by the policy*. (f)

It must be proved that loss on goods accrued upon the risk, or voyage, insured.

With regard to *freight*, the inception of the risk in cases

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(z) Marshall v. Parker, 2 Camp. 69.

(a) Twemlow v. Oswin, 2 Camp. 84.

(b) Koster v. Innes, Ry. & Mood. 333.

(c) Peppin v. Solomon, 5 T. Rep. 496.

(d) Hughes v. Wilson, 1 Stark. Rep. 180.

(e) See last section.

(f) Parker v. Tunno, 2 Camp. 38.

where it is secured by charter-party, is proved by evidence of the sailing of the ship, and the production of the charter-party (*g*): in other cases it is proved either by showing that all the goods were actually loaded on board, or that part of them were so, and the rest contracted for and ready to be shipped (*h*); and that the ship, at the time of loss, was ready to receive them. (*i*)¹ If the plaintiff relies on a contract to ship the goods on freight, he must be prepared to show that such contract is legally binding (*j*), though it need not be written or under seal. (*k*)

Proof of the ship's sailing, and that loss was during the risk.

Proof of inception of risk on freight.

SECT. X. *Proof of Loss.*

ART. 1. *Fact of Loss. — Means of Proof.*

§ 474. Direct proof of the fact of loss may be, and in most cases is, given by the parol testimony of the master, officers, or some of the crew of the ship; it may also be proved by other legal evidence. Thus, in one case, Mr. Justice Le Blanc ruled that the fact of capture might be proved by the production of Lloyd's book, wherein it was mentioned (*l*): the condemnation, however, of a foreign court of prize is not evidence to prove a capture in fact, though, after such proof has been given, it is evidence of the grounds of condemnation. (*m*)²

Proof of loss.

Fact of loss how proved.

The protest of the captain, so long as he is living, is in no case evidence on the one side or the other:³ the only use that

Protest of captain is not legal evidence in chief.

(*g*) See *Thompson v. Taylor*, 6 T. Rep. 453. *Horncastle v. Stuart*, 7 East, 400.

(*h*) *Forbes v. Aspinall*, 13 East, 323. *De Vaux v. J'Ansen*, 5 Bingh. N. C. 519.

(*i*) *Williamson v. Innes*, 1 Mood. & Rob. 88. 8 Bingh. 81, note.

(*j*) *Flint v. Flemyng*, 1 B. & Ad. 48.

(*k*) *Patrick v. Eames*, 3 Camp. 441.

(*l*) *Abel v. Potts*, 3 Esp. 242.

(*m*) *Marshall v. Parker*, 2 Camp. 69.

¹ *Ante*, 301, 302, 468, 478, 479, in notes.

² *Ante*, 649, et seq. and in notes.

³ See *Smith v. Logan*, 1 Speers, 274; *Miller v. S. Car. Ins. Co.* 2 M'Ord, 336; *Brown v. Girard*, 4 Yeates, 115; *Ruan v. Gardner*, 1 Wash. C. C. 145. The survey is not evidence of itself to be given by the plaintiffs claiming for a loss unless the defendants should call for it. *Hall v. Franklin Ins. Co.* 9 Pick. 477; *Mitchell v. N. Eng. Mar. Ins. Co.* 6 Pick. 117; *Rankin v. Amer. Ins. Co. of N. Y.* 1 Hall, 619, 633. See *Saltus v. Commercial Ins. Co.* 10 John. 457; *Abbott v. Sebor*, 3 John. Cas. 46;

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can be made of it is to contradict his testimony if he vary *from it (*n*): it cannot be adduced to disprove the grounds of the condemnation of a foreign prize court (*o*): nor will the broker's having shown it to the underwriter with other papers relating to the loss, on demand of payment, make it evidence as against the assured. (*p*)

Proof of confiscation.

In one case Lord Ellenborough ruled that, in order to prove a *confiscation*, it was not necessary to show that the proceeds of the goods seized, actually came into the treasury of the state, but that it was enough to show that they were *forcibly taken possession of by the officers of government*. (*q*)

Presumptive proof of loss.

We have already sufficiently considered what will amount to presumptive proof of loss by foundering, and need not here repeat the points decided on that head (*r*): it may be added, that in such cases, it is proper to be provided with evidence of any collateral circumstances that may tend to support the presumption, as, that other vessels which sailed at the same time did actually arrive (*s*), the usual length of the voyage, the difficulty of navigation, the prevalence of tempestuous weather, &c.¹

ART. 2. *Amount of Loss.*

Amount of loss need never be proved where the loss is total and the policy valued.

§ 475. In cases of *total* loss no proof of the amount of loss, or rather of the amount of interest at risk, need be given in

(*n*) *Christian v. Coombe*, 2 Esp. 489.

(*q*) *Carruthers v. Gray*, 3 Camp. 142.

{ *Marine Ins. Co. v. Strae*, 1 Mumf. 408. }

(*r*) See *ante*, Part III. Chap. II. vol. ii. pp. 792 - 795.

(*o*) *Ibid*.

(*s*) *Newby v. Reid*, Park on Ins. 148.

(*p*) *Senat v. Porter*, 7 T. Rep. 156. 8th ed.

Robinson v. Commonwealth Ins. Co. 3 Sumner, 226; *Robinson v. Clifford*, 2 Wash. C. C. 1. It is, however, unusual for the assured to go to trial without the production of the survey, and the testimony of the surveyors. *Robinson v. Commonwealth Ins. Co.* 3 Sumner, 226. As to the effect of the survey in evidence, see *Gordon v. Mass. F. & Mar. Ins. Co.* 2 Pick. 249; *Griswold v. National Ins. Co.* 3 Cowen, 96.

¹ It is not sufficient for the assured to prove that there was a storm, or any other peril encountered by the ship during the voyage, but he must also show that the loss was caused thereby. *Coles v. Mar. Ins. Co.* 3 Wash. C. C. 159, 161. See *Coffin v. Phoenix Ins. Co.* 15 Pick. 291. Neither is it sufficient to show merely that repairs have been necessarily made during the voyage on a vessel proved to be seaworthy at the commencement of it. The assured must still prove that the repairs were rendered necessary by the extraordinary operation of the perils insured against. *Donnell v. Col. Ins. Co.* 2 Sumner, 366.

valued policies; the value in the policy being, in such cases, taken as the agreed *measure* of indemnity: in cases of average loss, where the whole subject to which the valuation was intended to apply has been at risk, the value in the policy is equally the *standard* of indemnity: but in such cases the amount of damage or depreciation sustained by the subject of insurance must be proved *aliunde*, in the manner already pointed out. (*t*)

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*In *open* policies, in cases whether of total or partial loss, the value of the property insured will have to be proved in order to ascertain the amount of loss, or, rather, the sum which the assured is entitled to claim from the underwriters in respect thereof: and this amount must be proved in the way already indicated. (*u*)

Proof of amount of loss in open policies.

In case of *total* loss on ships in open policies, (which, however, are not frequent on this interest,) the mode of proving the insurable value, and therefore the amount of indemnity claimable by the assured, would be by the testimony of surveyors, who were acquainted with the condition, and can give an estimate of the worth, of the ship before she sailed on her last voyage: in cases of *average* loss the expense of repairs, deducting one third new for old, would be the measure of damages and must be proved by the production of the ship-builder's accounts, accompanied with vouchers and other proofs of payment.

In case of total loss on ship.

In case of average loss and repairs.

It is clearly settled that the assured may recover for a partial, although he has declared for a total, loss. (*v*) He may, as we have already seen, recover for loss by salvage, although it be not specifically alleged as a loss in the declaration (*w*): but if it be salvage which he has been obliged to pay to *recaptors*, he cannot recover the amount, unless he produces and proves the proceedings in the Admiralty court under seal; for the extent of his claim depends on the judgment of that court. (*x*) Where the assured on ship, who had claimed a total, but was only entitled to an average, loss,

Assured may recover for a partial, though he has declared for a total loss.

Loss by salvage may be recovered without being specially declared for. — Amount of, how proved. *Nominal* damages only, where no proof of the *extent* of loss.

(*t*) See *ante*, Part III. Chap. V. vol. ii. pp. 963–977. Adjustment of Particular Average.

(*w*) *Cary v. King*, Rep. t. Hardw. 304.

(*u*) See *ante*, pp. 1331, 1332, &c.

(*x*) *Thellusson v. Shedden*, 2 Bos. & Pull. N. R. 129, and 43 G. 3. c. 160. s. 40.

(*v*) *Gardiner v. Croasdale*, 2 Burr. 904.

{ *Watson v. Ins. Co. of N. A.* 1 Binney, 47. }

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Amount of loss
in cases of
double insur-
ance.

Where assured
has effected the
policy to protect
other parties'
interests, as well
as his own.

Interest on the
amount of loss
since 3 & 4 W.
4. c. 42. s. 29.

Interest on bot-
tomry loans.

merely proved that his ship had sustained *some damage*, but gave no evidence as to its extent, Lord Tenterden directed the jury to find a verdict for the plaintiff with nominal damages only. (*y*)

*In cases of double insurance, as we have elsewhere seen, the assured may recover against either set of underwriters up to the whole amount insured by them (*z*): if, however, after having recovered against one, he afterwards goes on against another set, he can only recover for the excess. (*a*)

He can, however, recover for more than the extent of his own individual interest if, in the opinion of the jury, he intended to insure not only on his own behalf, but also on that of some other party who was also interested in the subject insured at the time of effecting the policy. (*b*)

By the common law, no interest was recoverable on the amount of loss, except in cases where the assured had, before the trial, made application to the underwriter for the amount, and notified to him the ground of his application. (*c*) Now, however, by the 3 & 4 Will. 4. c. 42. s. 29., juries may, if they think fit, give *damages, in the nature of interest, over and above the money recoverable in all actions on policies of insurance made after the passing of the act.*¹

In regard to interest on *bottomry loans*, it has been laid down by Mr. J. Story, that the sum lent and the bottomry interest are to be considered as an aggregate debt from the time the bond becomes due by the successful termination of the voyage, and that, consequently, from such time common interest is to be allowed on the aggregate amount (*d*): and such, it should seem, would now be the law in this country,

(*y*) *Tanner v. Bennett, Ry. & Mood.* 182. But, as Mr. Phillips remarks, the damage should not be less than the usual exception of losses under 3 per cent. in the policy.

(*z*) *Newby v. Reid*, 1 W. Bl. 416. *Rogers v. Davis*, Park on Ins. 601. 8th ed. < *Lucas v. Jefferson Ins. Co.* 6 Cowen, 635. >

(*a*) *Bousfield v. Barnes*, 4 Camp. 228.

(*b*) *Irving v. Richardson*, 2 B. & Ad. 193.

(*c*) *Bain v. Case*, 3 C. & P. 406. See *Kingston v. M'Intosh*, 1 Camp. 513. *Higgins v. Sergeant*, 2 B. & Cr. 348. This seems still the rule in the United States. 2 Phillips on Ins. 750, 751.

(*d*) In † *Ship Packet*, 3 Mason, 255, cited 2 Phillips on Ins. 751.

¹ See *Neilson v. Col. Ins. Co.* 1 John. 312; *Jumel v. Marine Ins. Co.* 7 John. 424; *Hallett v. Phoenix Ins. Co.* 2 Wash. C. C. 279; *Oscar v. Louis. Ins. Co.* 5 Martin, 371; *Sims v. Willing*, 8 Serg. & R. 103.

as it is not to be supposed that the old maxim *accessio accessio non est* (e) would in the present day have any weight with our courts.

Proof of loss.

*ART. 3. *Proof of Loss as alleged. — Variance.*

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§ 476. It will not be necessary, after the full consideration which has been already given to the mode of stating and proving Losses by the Perils insured against (f), to do more in this place than notice a few of the more important points of variance between the proof of loss at the trial, and its statement in the declaration: it may be observed generally, that, since the New Rules prohibiting more than one special count in actions on policies, the courts would, no doubt, be inclined to extend the latitude of construction, by which, even before those rules, an allegation of loss by *perils of the sea* was held to be supported by proof of any loss proximately caused by such perils, although remotely occasioned by the acts or negligence of the master and crew; by barratry or other conducing cause (g): on the other hand, care should be taken by the pleader to adapt the allegation to the true state of facts, and if there be any doubt whether the proof would sustain a count for loss by perils of the seas, it should be described according to the actual facts of the case.

Proof of loss as alleged: variance since the New Rules.

One of the most striking instances of the former strictness of the courts, in requiring an accurate correspondence between the allegation and the proof, is contained in the following case.

Instance of former strictness of courts as to variance. *Nesbitt v. Lushington*, 4 T. R. 783.

The declaration, on a policy on corn, warranted "*free of average*," contained two counts; one for a loss by *detention of people*, the other for *seizure by pirates*; the proof was, that the corn had sustained an average loss, partly caused by a riotous mob, who had boarded the ship and *compelled the captain to sell it at an inferior price*; partly by damage arising from *stranding*: on this proof the court held that the plaintiff could recover on neither count — not on the first, for a mob was not a *people*, within the meaning of the policy — nor on the second, for though the loss, by taking the corn, fell within

(e) Marshall on Ins. 759.

(g) See *Elyth v. Shepherd*, 9 Mees.

(f) See Part III. Chap. II. pp. 792. & Wels. 763. *Parfitt v. Thompson*, 13 Mees. & Wels. 392.

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*a seizure by pirates, yet, as it was an *average* loss, the underwriters were free from liability under the memorandum, though they would have been liable for the subsequent loss by the *stranding*, had the declaration contained a count for loss thereby. (h)

Proof of an allegation of loss by the perils of the sea.

With regard to losses by the *perils of the sea*, it may be observed generally, that all losses proved to be *proximately caused* by the winds and waves, by driving against rocks, or stranding, &c., though remotely occasioned by the acts and negligence (not amounting to barratry) of the master and crew, will sustain an allegation of loss by the perils of the sea (i); and the same rule holds where the loss, in like cases, is remotely occasioned by barratry (j); though it is otherwise where barratry is the direct conducting cause of the loss (k): where *stranding* is proved to be the main conducting cause of the total loss claimed in the action, it will support an allegation of loss by the perils of the seas, though followed by subsequent capture and condemnation (l); on the other hand, where the damage occasioned by the stranding is slight or partial, and the substantial cause of the total loss claimed is the consequent capture or seizure, this will not support an allegation of loss by perils of the seas, but the loss should be averred to be by the capture, &c. (m) Damage done by *collision*, where there is no fault on either side, is a loss by the perils of the sea (n): so it is where the fault rests entirely with the other vessel (o): but a sum paid under an award *judicio rusticorum*, as a moiety of the damages done by collision, is not, in this country, a loss by perils of the seas, on the ground that it is not proximately caused by those perils (p):

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*on the same ground, loss by sale of goods, for repairs of the ship, has been held not to be a loss by perils of the seas (q): damage caused by taking the ground in a tide harbor, in the

(A) Neabitt v. Lushington, 4 T. Rep. 783.

(i) Walker v. Maftland, 5 B. & Ald. 171. Stewart v. Bell, *ibid.* 238. Phillips v. Headlam, 2 B. & Ad. 380. Dixon v. Sadler, 5 Mees. & Wels. 205. Redman v. Wilson, 14 Mees. & Wels. 476.

(j) Heyman v. Parish, 2 Camp. 149. Blyth v. Shepherd, 9 Mees. & Wels. 723.

(k) Everth v. Hannam, 6 Taunt. 375.

(l) Hahn v. Corbett, 2 Bingh. 265.

(m) Green v. Elmalie, Peake, N. P. 212. Livie v. Jansen, 12 East, 648.

(n) Buller v. Fisher, 3 Esp. 67.

(o) Smith v. Scott, 4 Taunt. 125.

(p) De Vaux v. Salvador, 4 Ad. & Ell. 420. *Aliter* in the United States, † Peters v. Warren Ins. Comp. 3 Sumner, 389. See *supra*, p. 806.

(q) Powell v. Gudgeon, 5 Maule & Sel. 431. Sarquy v. Hobson, 2 B. & Cr. 7. 4 Bingh. 131.

usual course of the voyage, has been held a loss by perils of the seas (*r*); but damage caused by the ships being blown over in a graving dock (*s*), or by her bilging owing to the giving way of tackle on being got out of dock (*t*), or owing to the tide washing away her props, while hove down on a beach for repairs (*u*), have been held not to be losses by the perils of the sea.

Death of cattle by rolling of the ship at sea (*v*), or partly by that cause and partly by their own violent kicking and plunging (*w*), is a loss by perils of the seas: if, however, their death were caused by scarcity of provisions owing to the prolongation of the voyage, either by the mistake of the captain (*x*), or in consequence of bad and stormy weather, it seems this would be a loss by mortality, and not by perils of the seas. (*y*) Damage caused to hull of ship by worms (*z*) and rats (*a*) is not a loss by perils of the sea, but by wear and tear.

Leakage caused by the violent pitching of the ship in a storm, is a loss by perils of the sea, though the stowage be not damaged. (*b*) So is damage caused to cargo by shipping seas, after being wrongfully seized and taken in tow by a British man-of-war, though the loss in this case may also be alleged to be by seizure (*c*); damage caused by one ship's *firing into another, under the mistaken notion that she is an enemy (*d*); or by throwing overboard goods, to prevent them falling into the hands of the enemy, is not loss by perils of the seas. (*e*)

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Loss of ship, reduced to a state of innavigability by sea damage, and justifiably sold by the master abroad, is a loss by the perils of the sea. (*f*)

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| (<i>r</i>) <i>Fletcher v. Inglis</i> , 2 B. & Ald. 315. | (<i>s</i>) <i>Rohl v. Parr</i> , 1 Esp. 444. |
| (<i>a</i>) <i>Phillips v. Barber</i> , 5 B. & Ald. 161. | (<i>a</i>) <i>Hunter v. Potts</i> , 4 Camp. 203. |
| (<i>t</i>) <i>De Vaux v. J'Ansen</i> , 5 Bingh. N. C. 519. | (<i>b</i>) <i>Crofts v. Marshall</i> , 7 C. & P. 597. |
| (<i>w</i>) <i>Thompson v. Whitmore</i> , 3 Taunt. 227. | (<i>c</i>) <i>Hagedorn v. Whitmore</i> , 1 Stark. 157. |
| <i>Rowcroft v. Dumore</i> , <i>ibid</i> . | (<i>d</i>) <i>Cullen v. Butler</i> , 5 Maule & Sel. 461. |
| (<i>v</i>) <i>Lawrence v. Aberdeen</i> , 5 B. & Ald. 107. | (<i>e</i>) <i>Butler v. Wildman</i> , 3 B. & Ald. 398. |
| (<i>w</i>) <i>Gabay v. Lloyd</i> , 3 B. & Cr. 793. | (<i>f</i>) <i>Parfitt v. Thompson</i> , 13 Mees. & Wels. 392. |
| (<i>x</i>) <i>Gregson v. Gilbert</i> , 3 Dougl. 232. | |
| (<i>y</i>) <i>Tatham v. Hodgson</i> , 6 T. Rep. 656, as explained and commented on by Lord Tenterden, 5 B. & Ald. 111. | |

Proof of loss.

Loss by fire.

An allegation of loss by fire, is sustained by proof that the ship was burnt by her captain, in order to avoid being captured (*g*); or that she was accidentally burnt by the negligence of her crew (*h*); but not where the fire is shown to have originated in the spontaneous combustion of goods put on board in an improper condition. (*i*)

Loss by capture or seizure.

Proof of capture by collusion will sustain the allegation of a loss by capture, though it would also support a count for loss by barratry (*j*); proof of wrongful detention by a British man-of-war would be evidence of a loss by *seizure*, though the sea-damage sustained during the detention is recoverable as loss by perils of the seas (*k*); proof that ship's cargo was taken out by enemies, and ship then suffered to sail with another, will support an allegation of *loss by detention of princes* (*l*); but an averment of *seizure in a hostile manner by enemies unknown*, is not sustained by evidence of seizure, by order of a foreign government, as of goods about to be illegally exported. (*m*)

Loss by barratry.

Under an allegation of loss by barratry, it is not necessary for the assured, in the first instance, to give negative proof that the person acting as master was not the owner: it lies on the underwriter to prove affirmatively that he was (*n*): but, in order to support a count for loss by barratry, it must *be proved that the master acted fraudulently, or against his better judgment. (*o*)

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SECT. XI. *Evidence in Defence.*ART. 1. *Unseaworthiness.*

Evidence in defence.

Is the plaintiff, in the first instance, to prove seaworthiness, or the defendant unseaworthiness?

§ 477. Since the New Rules, as we have seen, this defence must be specially pleaded: a question may arise as to the party on whom the burden of proof lies, on the issue raised

(*g*) *Gordon v. Rimmington*, 1 Camp. 123.

(*h*) *Busk v. Royal Exch. Ass. Comp.* 2 B. & Ald. 72.

(*i*) *Boyd v. Dubois*, 3 Camp. 133.

(*j*) *Arcangelo v. Thompson*, 2 Camp. 621.

(*k*) *Hagedorn v. Whitmore*, 1 Stark. 150.

(*l*) *Abel v. Potts*, 3 Esp. 242.

(*m*) *Matthie v. Potts*, 3 Bos. & Pull. 23.

(*n*) *Ross v. Hunter*, 4 T. Rep. 33.

(*o*) *Todd v. Ritchie*, 2 Stark. 240. *Bottomley v. Bovill*, 5 B. & Cr. 212.

by a denial of this plea: as the fact of seaworthiness is a condition precedent, implied by law, to the attaching of the policy, it should seem that it lies on the assured to give some proof of it in the first instance (*p*), although there can be no doubt that very general and slender evidence of seaworthiness at the commencement of the risk would be sufficient to make out a *prima facie* case, and throw on the underwriter the proof of unseaworthiness.¹

Evidence in
defence.

If the underwriters can show that the ship, shortly after sailing, without any visible or adequate cause, became leaky, or otherwise incapable of performing the voyage insured, this will be presumptive proof that she was unseaworthy at the commencement of the risk (*q*);² though if two special juries have concurred in finding a verdict in opposition to this presumption, the court will not, on that account, grant a third trial. (*r*)

Presumptive
proof of unsea-
worthiness at
the commence-
ment of the
risk.

Upon a question of seaworthiness experienced shipwrights may be called to give an opinion, whether, upon the facts proved, the ship could have been seaworthy at the commencement of the risk. (*s*)³

Opinion of ship-
wrights as to
seaworthiness.

(*p*) Per Mr. J. Story in *† Tidmarsh v. Washington Fire and Mar. Ins. Comp.* 4 Mason, 441. But the Supreme Court of Massachusetts held that the ship is to be presumed seaworthy till the contrary appears, and that the burden of proving seaworthiness is on the underwriters. *† Paddock v. Franklin Ins. Comp.* 11 Pick. 227. 2 Phillips, Ins. 757, 758. *See the remarks of Hubbard J. in Deshon v. Merchants' Ins. Co.* 11 Metcalf 199, 207, cited *ante*, 686 in note, where will be found other cases to this point, and the subject considered. See *Brown v. Girard*, 4 Yeates, 115. }
(*q*) *Watson v. Clark*, 1 Dow. 344. *Munro v. Vandam*, Park, 469, 8th ed. *Parker v. Potts*, 3 Dow, 23.
(*r*) *Foster v. Steele*, 3 Bingh. N. C. 892. 5 Scott, 25.
(*s*) *Beckwith v. Sydebotham*, 1 Camp. 116. *Thornton v. Royal Exch. Ass. Comp.* Peake, 25.

¹ If it has been proved that the vessel was seaworthy at the commencement of the risk, the presumption of law is that she continues so until proof is offered to the contrary. *Martin v. Fishing Ins. Co.* 20 Pick. 369. See this subject more fully discussed, *ante*, 685 to 689, and in notes; *Popleston v. Kitchen*, 3 Wash. C. C. 138; *Talcott v. Com. Ins. Co.* 2 John. 124; *Fontaine v. Phoenix Ins. Co.* 10 John. 58.

² So, if it appears from the proof, that the vessel was lost by springing a leak and foundering in moderate weather, the presumption is, that this arose from weakness and internal defect, and the burden of proof is upon the insured to show that it arose from stress of weather, or from collision, or other external injury, of an extraordinary character coming under the denomination of the perils of the seas. *Paddock v. Franklin Ins. Co.* 11 Pick. 227, 237. See *Copeland v. New Eng. Marine Ins. Co.* 2 Metcalf, 237, 238; *Court v. Del. Ins. Co.* 2 Wash. C. C. 480; *Warren v. United Ins. Co.* 2 John. Cas. 231.

³ *Ante*, 688.

Evidence in
defence.

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Burden of
proof under plea
of misrepresent-
ation.

* ART. 2. *Misrepresentation and Concealment.*

§ 478. Proof of misrepresentation will generally comprise the following facts: 1. That the representation was made; 2. That it was material; 3. That it was either false at the time, or falsified by subsequent events. In order to prove the first point, the broker should be called by whom the representation was made: its materiality is a question for the jury, and will generally be made out by the nature of the statement itself: the proof of the third point will depend upon, and be readily suggested by, the facts of the case.

Under plea of
concealment
and replication
de injuriâ.

Where the defence is concealment, and the replication *de injuriâ*, the defendant, besides proving that the fact really existed, that it was known to the plaintiff at the time of effecting the policy, and that it was material,¹ must also give some evidence that it was not communicated:² slender evidence, however, of this latter point will suffice; and there may be cases in which the materiality of the fact is so apparent, that mere proof of its existing and being known to the plaintiff at the time of effecting the policy will be sufficient *primâ facie* evidence that it was not communicated. (t)³

ART. 3. *Illegality.*

Proof of illegality
is on defend-
ant.

§ 479. Illegality is never presumed, but must be always proved in the first instance by the party who relies on it as a defence: thus, whenever the defence turned on the non-compliance with the convoy acts, Lord Ellenborough held that the burden of proof lay on the underwriters to make

(t) *Elkin v. Jansen*, 13 Mees. & Wels. 655.

¹ *Ruggles v. Geo. Ins. Co.* 4 Mason, 74; *Fiske v. N. Eng. Ins. Co.* 15 Pick. 310.

² See *Livingston v. Delafield*, 3 Caines, Rep. 49; *Fiske v. N. Eng. Mar. Ins. Co.* 15 Pick. 310.

³ See 2 Greenl. Ev. § 396 to § 398. Where the underwriter sets up the defence of misrepresentation, negligent navigation, and deviation, the burthen of proof rests on him to make out the case he thus undertakes to establish. Each of them constitutes a substantial ground of defence, in respect to which the plaintiff is not to prove the negative, but the defendant is required to make out the affirmative. *Tidmarsh v. Washington F. & M. Ins. Co.* 4 Mason, 441. See *American Ins. Co. v. Bryan*, 26 Wendell, 563; *Popleston v. Kitchen*, 3 Wash. C. C. 138; *Col. Ins. Co. v. Catlett*, 12 Wheaton, 383.

out, in the first instance, how the acts had been violated. (*u*) So, where an insurance was made to a port or ports within a certain territory, where some of the ports were neutral and others hostile, it was held that the presumption was that the ship was destined to one of the neutral ports. (*v*)

Evidence in
defence.

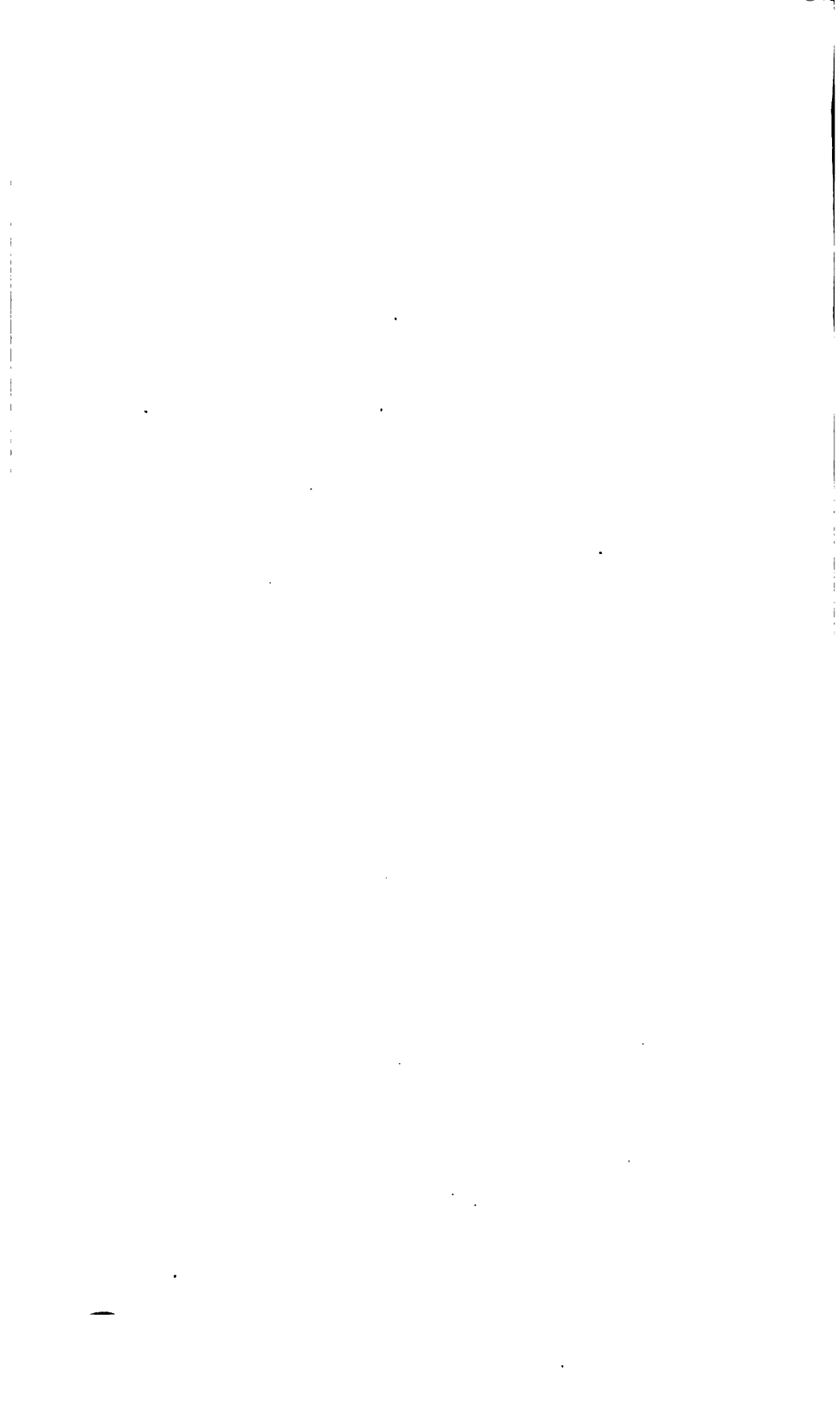
* 1347

*Under this head may be inserted the following case, which was omitted in the chapter on Wager Policies, as showing what will be sufficient proof of a gaming policy under the 14 G. 3. c. 18.:—An engagement, “in consideration of 40 guineas received of —, to pay — 100 guineas, in case Imperial Brazilian mining shares should be done at above par before 31st December, 1829;” was held a policy of insurance, and void within the above statute, the assured not being interested in the subject of insurance, and his name not being mentioned in the body of the instrument. (*w*)

Contract illegal
as a gaming
policy under
14 G. 3. c. 18.

(*u*) Thornton v. Lance, 4 Camp. 231.
D'Aguilar v. Tobin, Holt, 185. 2 Marsh.
Rep. 265.

(*v*) Anon. 1 Chitt. Rep. 49.
(*w*) Paterson v. Powell, 9 Bingh. 320.
2 M. & Scott, 399.



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*. * The numerals i. ii. refer to the vols.

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